# COMMENTS

# THE LITIGATING AMICUS CURIAE: WHEN DOES THE PARTY BEGIN AFTER THE FRIENDS LEAVE?

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## INTRODUCTION

The appearance of the amicus curiae[1] in our state and federal courts has become a standard feature of litigation during the twentieth century.[2] Unlike several other aspects of our federal judicial system,[3] the genesis of the amicus device did not occur within this century. To the contrary, the amicus curiae has a long lineage ex-

1. *See* 3A C.J.S. *Amicus Curiae* § 2 (1973) (defining concept of amicus curiae); 4 AM. JUR. 2D *Amicus Curiae* § 1 (1962) (examining literal meaning of amicus curiae, which is "friend of the court"). The amicus curiae, in a general sense, is a group or person that interposes in a judicial proceeding, upon judicial request or appointment, for the purpose of providing the court information on matters of law or public interest. United States v. Michigan, 940 F.2d 143, 163-64 (6th Cir. 1991). In a traditional sense, the amicus curiae is not a party to litigation, but participates by making suggestions and ensuring complete presentation of fact and issues. Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974).

The manner and purpose of providing information has been a subject of debate among commentators and courts. The traditional view was that an amicus was an impartial judicial servant. *Michigan*, 940 F.2d at 164-65; New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (positing that amicus curiae, unlike one who gives highly partisan view of facts, is detached from litigation and can assist court); *see* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 110 (2d ed. 1984) (stating amicus curiae was first thought of as impartial servant). Others assert that there is no requirement of amicus curiae impartiality, and allow amici to present partisan or personal views to the court. *Michigan*, 940 F.2d at 165 (stating that bias of amicus curiae was not significant to litigation); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 697-704 (1963) (detailing evolution of amicus curiae from impartiality to partisan advocacy).

2. *See* HERBERT JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS 41 (1984) (indicating that between 1970 and 1980 one-half of noncommercial cases on appellate level involved amici curiae participation); WASBY, *supra* note 1, at 110 (stating that since 1960s there has been increase in amicus curiae participation due to interest group involvement); Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore"*, 16 LAW & SOC'Y 311, 317 (1981-1982) (indicating that between 1970 and 1980, amici curiae participated in one-half of all noncommercial cases and two-thirds of all such cases when criminal cases were factored out).

3. *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1901, at 228

tending from Anglo-American common law, from as far back as the 14th century, and Roman law.[4] Traditionally, the amicus curiae was not a party to the litigation, but served as an impartial assistant to the judiciary, providing advice and information to a mistaken or doubtful court.[5]

Since its inception, the judicial use of the amicus curiae status has undergone change and modification.[6] Throughout its history, the amicus curiae was used as a flexible judicial tool to address the shortcomings of the adversary litigation process, frequently shifting form as the nature of the adversary process changed.[7] Most notably, the amicus device evolved into a means of representing third-party interests potentially affected by ongoing litigation.[8]

Even today, the amicus curiae retains its trait of adaptability. As a result, the amicus status reflects twentieth century changes in the

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(1986) (indicating that provisions for third-party practice—class action, joinder, intervention—did not come to be accepted until late 19th to 20th centuries).

4. *See* Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1017 (1967) (describing amicus curiae status as device known of in Roman law, throughout medieval England, and currently employed by French courts in limited manner); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1176 (1953) (indicating amicus curiae had respected role in Roman law); Krislov, *supra* note 1, at 694 (stating that Roman law apparently recognized amicus curiae status). The amici curiae under Roman law were judicially appointed attorneys, which served to advise and assist the court in the disposition of cases. Comment, *The Amicus Curiae*, 55 NW. U. L. REV. 469, 469 n.3 (1960) [hereinafter Comment, *Amicus Curiae*]. The amicus curiae performed these duties by providing nonbinding opinions on points of law with which the court was unfamiliar. *Id.* The Roman law amicus curiae was a forerunner of the Anglo-American amicus device. Angell, *supra*, at 1017; *see* Frank M. Covey, Jr., *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 33-34 (1959-1960) (indicating that some authors attribute development of amicus device to Roman law, but suggesting modern practice was closer to English use).

5. United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991); *see* WASBY, *supra* note 1, at 110 (indicating amicus curiae was initially thought of as neutral servant and over time has shifted from impartiality to advocacy). The amicus curiae has frequently met this task through the use of written briefs and memoranda, or on rarer occasions, through oral representation and argument. *See* John Koch, Comment, *Making Room: New Directions in Third Party Intervention*, 48 U. TORONTO FAC. L. REV. 151, 157 n.26 (1989) (stating American amicus curiae takes advocacy role primarily through presentation of written brief); Comment, *Amicus Curiae*, *supra* note 4, at 170-71 (describing limited role of amicus curiae and indicating amicus may be allowed oral argument); Eugene R. Fidell, *Befriending the Court: A Few Words on Amicus Briefs*, LEGAL TIMES, Sept. 5, 1983, at 8, 9 (indicating that brief is most common form of amici participation and that under limited circumstances court may grant oral argument); *see also* FED. R. APP. P. 29 (allowing amicus participation with consent of parties or leave of court, but limiting oral presentation to extraordinary instances).

6. *See* Krislov, *supra* note 1, at 694 (indicating that there has been incorrect assumption that role and function of amicus curiae has remained unchanged since its Roman and common law origins).

7. Krislov, *supra* note 1, at 720. *See generally* Krislov, *supra* note 1 (describing the evolution of amicus curiae involvement from fourteenth century to present federal court use).

8. *See* Krislov, *supra* note 1, at 720 (concluding amicus is catch-all device developed to overcome difficulties in representing third-party interests under common law system of adversary proceedings); Koch, *supra* note 5, at 157 (indicating amicus curiae was historic method of third-party intervention in Anglo-Canadian common law).

present federal judiciary.[9] No longer a mere friend of the court, the amicus has become a lobbyist,[10] an advocate,[11] and, most recently, the vindicator of the politically powerless.[12] As federal courts confronted ever more complex cases and sought innovative techniques to manage judicial resources and secure fair representation of interests outside their jurisdiction, the amicus curiae device provided a potential solution. As a result, federal district judges maximized the amicus curiae's adaptability and allowed "litigating amicus curiae," possessing abilities beyond mere brief writing, to participate in matters before their courts.[13] Initially these hybrid amicus devices al-

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9. In recent decades important judicial decisions have taken on a greater political character. *See* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 99-118 (1979) (discussing politicalization of federal courts, especially Supreme Court, through process of judicial review); HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 401 (1988) (describing important federal cases as "politicolegal"). As a result, the effects of a court decision are more likely to be realized by nonparties to the litigation. *See* WRIGHT ET AL., *supra* note 3, § 1901, at 228 (suggesting that strict adherence to adversarial system will likely result in unrepresented third-party interests); Krislov, *supra* note 1, at 699 (suggesting that adoption of formal rule for amicus curiae participation and other forms of third-party intervention was function of era where semi-political decisions were being reached). As a further result of court politicalization, the role of the amicus curiae has been expanded. *See* STUMPF, *supra*, at 401 (asserting that use of amicus curiae device helps satisfy goal of pluralistic policy making by allowing wide spectrum of views); Harper & Etherington, *supra* note 4, at 1172 (indicating politicalization of federal decisions has resulted in increased amicus curiae participation). This expanded use of the amicus curiae enables the court to look beyond the parties' arguments and see the broader social implications of their decisions. WASBY, *supra* note 1, at 102; *see* SHELDON GOLDMAN & THOMAS P. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 30 (3d ed. 1985) (indicating that courts allow amicus curiae to join litigation when larger policy implications are involved).

10. *See* JACOB, *supra* note 2, at 42 (suggesting that techniques used by amici curiae to influence courts bear striking parallel to methods of executive and legislative lobbyists). *See generally* Harper & Etherington, *supra* note 4, at 1172-76 (describing growing trend of using amicus curiae brief as means of lobbying Supreme Court and other federal courts).

11. *See generally* Krislov, *supra* note 1, at 694-704 (outlining the evolution of amicus curiae device from impartial judicial advisor to advocate for interests of parties or own self interest).

12. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (allowing U.S. Government to act as amicus curiae to protect interests of prisoners); *In re* Estelle, 516 F.2d 480, 483-85 (5th Cir. 1975) (validating district court's use of amicus curiae to act on behalf of prisoners); United States v. Michigan, 116 F.R.D. 655, 657 (W.D. Mich. 1987) (allowing private amicus curiae to participate in enforcement of decree compliance hearing concerning Michigan prisons); Faubus v. United States, 254 F.2d 797, 804-05 (8th Cir. 1958) (allowing United States, as amicus curiae, to assist court in enforcement of school desegregation order); *see also* Brief for Appellee at 2, United States v. Michigan, No. 88-1869, 1990 WL 46637 (6th Cir. Apr. 20, 1990) [hereinafter Brief for Appellee] (arguing that court should allow litigating amicus in prisoner's rights case and defining litigating amicus curiae as entity capable of participating in court proceedings with rights of parties to action).

13. In this Comment, the use of the term "litigating amicus" does not entail any special significance or status. Rather, the term "litigating amicus" merely indicates an amicus curiae that engages in an activity beyond the traditional roles of brief writing and occasional oral argument. Despite the special significance that a court may wish to bestow upon this term, a litigating amicus is just a common law amicus curiae. *See* United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991) (focusing merely on label of "litigating amicus curiae," yet failing to recognize that device was common law amicus which district court had granted broad powers). As this Comment will demonstrate, the amicus curiae's role varies with the exigencies before a given court. The amicus device embodies sufficient flexibility to allow courts to expand or contract its power at will. *See infra* notes 16-18 and accompanying text (indicating

lowed federal executive participation to maintain justice and judicial integrity. Ultimately, courts and litigants pushed the precedent that created enhanced amici to extremes.

Through the efforts of creative judges and litigants, the amicus curiae status has surpassed the traditional bounds of its common law ancestor. As evidenced in recent litigation, the amici performed various roles normally reserved for party participants.[14] In its litigating form, the amicus has transcended its normal role of briefing the court. Instead, some federal district courts have permitted the amicus to actively engage in oral argument, to introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon party-participants to the litigation.[15]

The vague discretionary standard and flexible tradition of the amicus curiae device, while generally useful, has created great confusion within the federal judiciary. At risk are several constitutional limitations placed on the federal judicial structure, the procedural framework controlling third-party practice, and the interests of litigants legitimately before the court. The amicus curiae device must attain its equilibrium, retaining sufficient flexibility without crossing the party threshold.

Due to the magnitude of these risks, this Comment focuses on the use of the amicus curiae device in federal district courts and balances the utility and hazards associated with the amicus curiae's vague, featureless nature. Part I traces the development of the amicus curiae from common law England to the device's introduction into the American federal judicial structure. Part I also reviews the current status of the amicus curiae within the federal structure. Part II discusses the emergence of the litigating amicus curiae, from its

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amicus curiae's traditional flexibility). Accordingly, this Comment focuses on the common law amicus device itself and not on any of the special labels that a given court may wish to call the amicus device. *See infra* note 161 and accompanying text (describing amicus curiae in case as having "hybrid status"); *infra* notes 172-77, 191-96 and accompanying text (labeling amicus curiae as "litigating amicus").

14. *See infra* notes 156-59 and accompanying text (describing powers of *Boeing* amicus curiae); *infra* notes 191-96 (listing powers of amicus in *Michigan Prisons Case*).

15. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (upholding amicus' involvement in discovery and party-like participation at trial); *In re* Estelle, 516 F.2d 480, 483 (5th Cir. 1975) (permitting United States as amicus curiae to employ full range of powers of party), *cert. denied*, 426 U.S. 925 (1976); EEOC v. Pan Am. World Airways, 52 Fair Empl. Prac. Cas. (BNA) 926, 931 (N.D. Cal. 1987) (allowing amicus curiae ability to participate in all depositions, file briefs, and participate in trial in unspecified manner); United States v. Michigan, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (allowing amicus curiae to present evidence at trial, enforce consent decree, and engage in oral argument); EEOC v. Boeing Co., 109 F.R.D. 6, 9-11 (W.D. Wash. 1985) (creating hybrid amicus status with ability to participate as counsel at trial and engage in discovery with EEOC).

quiet judicial grant on governmental amici to its near grant of party status to private interests.

The Comment, in Part III, addresses how the unchecked use of the amicus curiae at the district court level endangers Article III standing requirements, as well as third-party practice under the Federal Rules of Civil Procedure. Part IV postulates that despite the Sixth Circuit's recent warning, danger still remains that courts may trample the present federal judicial structure in order to seek fairness and efficiency. As a result, Part V sets forth common law and Federal Rule-based solutions to bridle the elusive amicus device. Both approaches seek to limit vast district court discretion and place the amicus device within the confines of the Federal Rules of Procedure, while maintaining the aspects that have contributed to the longevity and usefulness of the amicus.

## I. ORIGIN AND DEVELOPMENT OF THE AMICUS CURIAE

The history of the amicus device hinges on a single principle: flexibility.[16] For centuries, courts avoided attaching a rigid definition to the amicus device.[17] By keeping the contours of the amicus concept nebulous and within the realm of judicial discretion, courts have been able to use the amicus curiae as a tool to surpass the limitations placed on the court by an adversary system of justice.[18]

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16. *See* League of Women Voters v. FCC, 489 F. Supp. 517, 518 (C.D. Cal. 1980) (asserting that role of amicus is flexible and can be molded by courts to best surmount exigencies of particular action); Krislov, *supra* note 1, at 720 (suggesting that historical role of amicus curiae device was that of judicial catch-all, used to overcome difficulties presented to courts due to nature of adversarial process). The concept of amicus flexibility is one which is best evidenced through the manners in which courts have utilized the device. For example, one 19th century English judge appointed himself amicus curiae to advise a lawyer, presently representing two adverse parties before the court, on an ethical matter. *Id.* at 695 (citation omitted). A common use of the amicus device in Texas likewise illustrates the principle of flexibility. Prior to 1957, Texas practitioners used the amicus curiae to raise personal jurisdiction for out of state clients. George B. Davis, Note, *Procedure—Amicus Curiae—Appearance*, 11 Sw. L.J. 382, 383 (1957). Because Texas did not have a limited appearance statute, potential parties used the amicus device to evade the general rule in Texas that any appearance by a party was a general appearance. *Id.* Under this practice, the defendant's attorney would appear at court as an amicus curiae; the attorney/amicus would then litigate the issue of jurisdiction without fear of entering her client's general appearance. *Id.*

17. Krislov, *supra* note 1, at 695-96. Krislov stated:

> Inasmuch as permission to participate as a friend of the court has always been a matter of grace rather than right, the courts have from the beginning avoided precise definition of the perimeters and attendant circumstances involving possible utilization of the device. This, of course, increases judicial discretion, while concomitantly maximizes the flexibility of the device.

*Id.*

18. *Id.*

### *A. Common Law Origins of the Amicus Curiae*

The earliest notion of amicus participation is found in Roman law.[19] Under Roman law, the amicus, at the court's discretion, provided information on areas of law beyond the expertise of the court.[20] From this practice emerged the English common law concept of an amicus as a disinterested bystander who, at the court's request or permission, informed the court on points of law.[21] In addition to its role of "oral shepardizer,"[22] an amicus could also act on behalf of infants or alert the court to manifest error, such as the death of a party.[23] Common law courts welcomed such aid and justified empowering the amici to engage in such activities under a theory that amici curiae, by helping the courts avoid error, served to maintain judicial honor and integrity.[24]

Although the amicus curiae device originally served as the judiciary's impartial friend, the common law maintenance of an adversary judicial process gradually undermined this role. Common law procedures were based on the theory of "trial by duel."[25] Here, the

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19. *See supra* note 4 (discussing Roman origin of amicus curiae device).

20. Comment, *supra* note 4, at 469 n.3.

21. Angell, *supra* note 4, at 1017; *see supra* note 4 (linking Roman amicus curiae to present day Anglo-American common law device). *But see* Covey, *supra* note 4, at 34-35 (questioning connection between Roman and present amicus curiae device).

22. Krislov, *supra* note 1, at 695 (indicating that one of traditional amicus roles was presentation of cases or statutes not known to judge).

23. Angell, *supra* note 4, at 1017; *see* Krislov, *supra* note 1, at 695 (describing aid of bystanders by calling cases to attention of courts); Koch, *supra* note 5, at 157 (describing amicus as having knowledge of statute, precedent, or procedural point not raised by parties).

24. *See* Edmond R. Beckwith & Rudolph Sobernheim, *Amicus Curiae—Minister of Justice*, 17 FORDHAM L. REV. 38, 38 (1948) (noting that amicus also helps "safeguard against judicial arbitrariness" and "preserves free government"); Krislov, *supra* note 1, at 695 (noting that amicus curiae informed court about caselaw and statutes not known to judge); *Amicus Curie*, *supra* note 4, at 470 n.7 (stating that even though amicus participation under English common law was to protect honor of court and not to serve particular party, amicus curiae participation obviously aided one party, even if only incidentally). Courts relied on this rationale as early as 1656. Protector v. Geering, Hardres 85, 86, 145 Eng. Rep. 394 (1656) (quoted in Beckwith & Sobernheim, *supra*, at 38). According to the court in *Geering*:

> It is for the honour of the Court to avoid error in their judgements. . . . The Court *ex officio* ought to examine . . . into errors, though not moved. Barbarism will be introduced, if it be not admitted to inform the court of such gross and apparent errors in offices.

*Id.* There is some indication that the honor-protecting role of the amicus curiae has been carried into the 20th century. As late as 1946, the Supreme Court stated that a federal court is free to call upon the services of an amicus curiae to protect the honor of the court in cases where the court has been a victim of fraud. Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580-81 (1946); *see* Garland Co. v. Filmer, 1 F. Supp. 8, 13 (N.D. Cal. 1932) (recognizing that amicus may appear to enlighten court); Thompson v. Fayette County, 302 S.W.2d 550, 552 (Ky. 1957) (indicating that it is commendable practice for courts to use all available assistance of its legal officers to reach correct results); McCoy v. Briegel, 305 S.W.2d 29, 39 (Mo. Ct. App. 1957) (stating that amicus may aid and assist court by providing services necessary for court to reach proper conclusion).

25. Krislov, *supra* note 1, at 695; *see* Charles Maechling, Jr., *Borrowing From Europe's Civil Law Tradition*, 77 A.B.A. J., Jan. 1991, at 59, 59 (describing Anglo-Saxon judicial proceedings,

parties were deemed to be the masters of the suit.[26] Under common law procedure, it was the parties' sole privilege and prerogative to control the course of the litigation, free from a stranger's interference.[27] As a result, the common law system was particularly resistant to expanding third-party involvement at the trial level.[28] In fact, until the adoption of code pleading, provisions permitting intervention were limited to admiralty and select equitable actions.[29]

Despite the fact that the trial by duel theory was adequate for resolving private disputes, it ignored the simple point that judicial proceedings often have repercussions felt beyond the parties before the court.[30] In an effort to cure the absence of third-party participation, courts once again looked to the malleable amicus curiae.[31] In response to potential inequity, common law courts gradually molded the amicus curiae device into an informal judicial method of representing third-party interests previously ignored under the adversarial system.[32]

The first reported instance of a court allowing an amicus curiae to participate in a trial solely to protect third-party interests was in 1736.[33] In *Coxe v. Phillips*,[34] the court permitted the amicus to inform the court that the suit between the parties was collusive in nature, ultimately designed to attack the marital status of the amicus.[35]

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under criminal justice system, as medieval tournament that is not ultimately concerned with establishment of truth).

26. WRIGHT ET AL., *supra* note 3, § 1901, at 228-29; *see* Comment, *Amicus Curiae*, *supra* note 4, at 470 n.8 (stating parties are usually deemed to be in control of their own litigation).

27. Krislov, *supra* note 1, at 696; *see* Comment, *Amicus Curiae*, *supra* note 4, at 470 (stating civil litigation's primary purpose is to provide speedy settlement of claims between individual adversaries in manner controlled by parties, and assertion of long-term interests may impede upon this primary goal of civil litigation). For example, in Canada, which shares an English common law heritage, liberal rules of third-party intervention have not been implemented; thus, the tendency to resist intervention by an outside party or amicus is still present. *See* Koch, *supra* note 5, at 154 (indicating that under Canadian law, where intervention is commonly restricted, original parties to litigation are entitled to have matter litigated and decided without delay caused by intervention of third parties).

28. Krislov, *supra* note 1, at 696.

29. WRIGHT ET AL., *supra* note 3, § 1901, at 228.

30. *See* WRIGHT ET AL., *supra* note 3, § 1901, at 228. ("A lawsuit often is not merely a private fight and will have implications on those not named as parties."); Krislov, *supra* note 1, at 696 (describing third-party representation as "one of the most serious and enduring shortcomings of the adversary system"); *see also* WASBY, *supra* note 1, at 102 (indicating that natural limits of adversarial system tend to stem information flow of outside effects to courts).

31. Krislov, *supra* note 1, at 696.

32. Krislov, *supra* note 1, at 696. In general, under traditional roles of the amicus, the amicus curiae can alleviate the problem of third-party representation simply by providing information. JACOB, *supra* note 2, at 151. By supplying a wider view of the problem at issue, the amicus curiae can help judges reach decisions which have value to the general community, in addition to the specific participants. *Id.*

33. Krislov, *supra* note 1, at 696 (citing Coxe v. Phillips, 95 Eng. Rep. 152 (K.B. 1736)).

34. 95 Eng. Rep. 152 (K.B. 1736).

35. Krislov, *supra* note 1, at 696-97; *see* Muskogee Gas & Elec. Co. v. Haskell, 132 P. 1098, 1099 (Okla. 1913) (permitting amicus curiae to intervene to point out collusion).

The case tied two strands of amicus curiae development together. A form of the traditional function of an amicus, preserving the courts' honor by avoiding error, was merged with the goal of representing third-party interests in an adversarial proceeding. As a result, *Coxe* enabled the amicus curiae to serve dual masters: the court and the amicus' own interests. In the future, the ability of an amicus curiae to act in an interested manner proved to be significant; courts and parties would later allow them to act as informal advocates for persons not formally under the jurisdiction of a court.[36]

### *B. An English Amicus Curiae Meets American Federalism*

With the continuation of English judicial traditions in the United States,[37] one would expect American courts to readily embrace the amicus device.[38] Yet, despite the long history of amicus curiae use in English courts, the amicus curiae did not make its debut in the American federal system until 1823.[39] Unique characteristics of American federalism, however, made the use of amici curiae inevitable, and the courts used the amicus curiae to address limitations in the litigation process.[40]

#### *1. Problems of third-party representation presented by the federal system*

The federal structure of the U.S. Government created a unique atmosphere for third-party practice to develop. The concept of dual state and federal sovereignties increased the number of third-party interests potentially left without representation in the course of a two-party trial.[41] Here, private and governmental classes of inter-

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36. *See* Krislov, *supra* note 1, at 697 (stating ability of amicus curiae to represent their own interests was fundamental transformation of amicus curiae and allowed amicus device "to assume radically new dimensions").

37. MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 77 (1978). The author noted:

> The most distinctive aspect of [early federal court] procedures was their rigorous adherence to the antiquated technicalities of English law. The writs, the forms of action, the pleadings, and the judgements were all consistent with traditional English practice. . . . They made no apparent compromise with tradition, no progress toward flexibility of modern legal practice. Their caseload reflected their era, but their procedures reflected the past.

*Id.*

38. *See* Krislov, *supra* note 1, at 699 (questioning why amicus curiae device was not used earlier in American federal system).

39. *See* Beckwith & Sobernheim, *supra* note 24, at 49 (indicating English use of amicus curiae as early as 1410); *see also* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 18 (1823) (granting amicus curiae's request for rehearing of case due to nonrepresentation of state interests).

40. *See* Krislov, *supra* note 1, at 699 (stating that amicus curiae device might have offered easier means of third-party representation than methods commonly used during early 18th century).

41. *See* Krislov, *supra* note 1, at 697-98 (describing how introduction of federal system to adversarial litigation process led to increased potential number of unrepresented interests

ests were in need of representation.[42] Interests of private citizens, either concerning proprietary or constitutional dimensions, remained a static feature of the judicial process under the federal judicial system.[43] The new addition, brought on by the introduction of the dual system of sovereignty, was in the realm of governmental interests. In any given case, state and national interests were potentially in conflict, leaving a greater number of public interests potentially without representation in private suits.[44]

Unfortunately, as the adoption of the federal system increased the number of potential unrepresented third-party interests, the opportunity for third parties to be heard within federal courts decreased.[45] Along with adopting the common legal notion of trial by duel, and its resistance to third-party participation, federal legal doctrines and constitutional requirements limited the opportunity for interested third parties to be heard in federal courts.[46]

Two procedural concepts, standing and complete diversity of citi-

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affected during course of private litigation); Loretta Re, *The Amicus Curiae Brief: Access to the Courts For Public Interest Associations*, 14 MELB. U. L. REV. 522, 525 (1984) (asserting that in addition to interests of States and Federal Government coming into conflict, suits between private citizens would leave the interests of the public unrepresented).

Land interests were a primary example of how federal doctrines limited resolution of interests created by federalism. For example, if two states had issued land patents for western territories which happened to overlap, and the holders of the two patents were domiciled within the same state, diversity requirements barred the adjudication of an issue generated by federalism. *See* TACHAU, *supra* note 37, at 153-54 (discussing adherence to jurisdictional limitations); *see also id.* at 167-75 (describing how inaccurate surveys and records led to land disputes in western territories). In addition, the Supreme Court's role of controlling procedural aspects of federal courts created the possibility that cases brought by private litigants could have system-wide effects on federal judicial structure. Krislov, *supra* note 1, at 697.

42. Krislov, *supra* note 1, at 697.

43. *See* Krislov, *supra* note 1, at 694-97, 699-702 (following amicus curiae device's development before and after introduction of amicus into American system of federalism).

44. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 320-21 (1819) (addressing conflict between Federal and State Government over taxing power). When a system of government is established which consists of two autonomous groups of sovereigns, conflict is bound to result. From the outset of our country's founding, states and the Federal Government have struggled over the allocation of power within the federal system. *See id.* at 326-27 (discussing significance of Supremacy Clause). This struggle has filled countless constitutional law texts, and has encompassed such issues as the regulation of interstate commerce, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 46 (1824); the power to tax, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 327-28, which body of law to apply, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); the power to review state actions concerning constitutional matters, e.g., Martin v. Hunters Lessee, 14 U.S. (1 Wheat.) 304, 342-43 (1816); and federal control over public lands, e.g., Camfield v. United States, 167 U.S. 518, 527-28 (1897), to name just a few examples. From its beginning, our country has debated the utility of a state or centralized government. *See* THE FEDERALIST PAPERS No. 14, 24-28 (R. Fairfield 2d ed. (1981)) (balancing benefits of national government with excess power reserved to states).

45. Krislov, *supra* note 1, at 697.

46. Krislov, *supra* note 1, at 698; *see* WASBY, *supra* note 1, at 111 (describing how tightening federal standing requirements increases qualities of adversarial system); *see* TACHAU, *supra* note 37, at 77, 158 (discussing adherence to English common law principles); *see supra* notes 24-28 and accompanying text (describing common law resistance to third-party intervention).

zenship, further limited the opportunity of third parties to represent their interests in the federal forum.[47] The basic standing requirement emanates from Article III's case or controversy provision.[48] At its core, Article III of the Constitution requires that a person have a sufficient stake in the controversy to obtain judicial resolution of that matter.[49] This creates a critical obstacle for those seeking to have issues adjudicated in federal court.[50]

The second limiting concept, the requirement of complete diversity, also originates in the Constitution. Under Article III, federal judicial power extends to cases involving litigants of diverse citizenship.[51] Early case law further limited this portion of federal jurisdiction. Under *Strawbridge v. Curtiss*,[52] each member of a party, all plaintiffs and defendants, must possess the required diversity of citi-

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47. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 107 (2d ed. 1988) (defining basic limits of federal judicial power); Krislov, *supra* note 1, at 697-98 (discussing how diversity requirement lessened third-party representation).

48. TRIBE, *supra* note 47, at 107 (stating that standing requirement is most central concept defining Article III's "case" or "controversy" requirement); *see* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471-75 (1982) (summarizing concept of standing and defining its place within federal system); Warth v. Seldin, 422 U.S. 490, 498-99 (1972) (defining standing).

49. *See Valley Forge*, 454 U.S. at 473 (requiring litigants to show "injury in fact"); Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (stating that standing depends on whether party has alleged such "personal stake in the outcome of the controversy"); Baker v. Carr, 369 U.S. 186, 204 (1962) (seeking guarantee that dispute sought to be adjudicated will be presented in adversary context and in form historically viewed as capable of judicial resolution); Flast v. Cohen, 392 U.S. 83, 101 (1968). In *Valley Forge*, the Supreme Court summarized the standing requirement. According to the Court,

> at an irreducible minimum, Art[icle] III requires the party who invokes the court's authority to "show that he personally has suffered some actual injury or threatened [injury] as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

*Valley Forge*, 454 U.S. at 472 (citations omitted). These considerations make up what the Court categorizes as the core of Article III. *Id.* at 475. The function of the Article III standing requirement is to assure that the federal courts do not become "a vehicle for the vindication of the value interests of concerned bystanders," United States v. SCRAP, 412 U.S. 669, 687 (1973), or serve as mere forums where public grievances are aired and debated. *Valley Forge*, 454 U.S. at 473.

In addition, courts are faced with prudential, nonconstitutional, concerns. Chief among these concerns is that plaintiffs assert their own legal rights and interests, and not those of third parties. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); *see* Warth v. Seldin, 422 U.S. 490, 499 (1975) (recognizing additional limitation to jurisdiction in that "generalized grievance" shared by all citizens does not alone satisfy jurisdictional requirements).

50. *See Valley Forge*, 454 U.S. at 471-76 (discussing Article III limitations on judicial power). The Court ruled that standing is a bedrock requirement and that those who do not meet the minimum requirements of Article III standing may not litigate as suitors before federal courts. *Id.* at 471, 475-76.

51. U.S. CONST. art. III, § 2, cl. 1. Article III, section 2, clause 1 states in pertinent part: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . to all cases . . . between citizens of different states." *Id.*

52. 7 U.S. (3 Cranch.) 267 (1806).

zenship for a federal court to have jurisdiction over a case.[53] The practical effect of *Strawbridge*'s complete diversity rule, was to exclude an indeterminate number of persons, with protectable interests, from having a voice in judicial proceedings.[54]

Thus, the contours of the federal structure, while creating a greater chance for unrepresented interests, narrowed the range of persons who could seek redress and protection of these interests before federal courts.[55] These aspects of federalism, combined with the common law history of hostility to intervenors, amplified the problem of third-party representation.[56]

*2. Early third-party practice before federal courts*

From the outset of the federal judicial system, the continuation of common law resistance to third-party participation and aspects of the federal system posed serious limitations on the federal judiciary. A formal means of third-party practice, either as intervening parties or amicus curiae, did not emerge until the 20th century.[57] In response to the perceived inequity, federal courts relied on informal means to assure that interested parties had sufficient representation.[58]

Federal courts initially used informal methods, tied directly to the discretion of the court, as a means of providing representation of individual or governmental interests.[59] Of these two types of interests, however, governmental interests were the first beneficiaries of federal judicial creativity.[60] Judicial recognition of the importance of representation of third-party governmental interests resulted in the use of a special form of intervention in admiralty and in rem

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53. Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 267, 267 (1806). State residency is determined by whether the person possesses the requisite intention to be domiciled within a given state as well as physical presence. Mas v. Perry, 489 F.2d 1396, 1400 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974).

54. *See* JOHN COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 261 (5th ed. 1989) (discussing how groups use limitation of diversity jurisdiction to avoid litigation in federal courts). For a summary of arguments against continuing diversity of citizenship jurisdiction see *id.* at 261-63.

55. Krislov, *supra* note 1, at 697.

56. *See* WASBY, *supra* note 1, at 111 (stating less access to federal courts enhances adversarial nature of process). In short, when federal courts become more restrictive concerning access, the judicial process moves toward the traditional model of an adversary legal system, thus cutting back on the representation of third-party interests. *Id.*

57. WRIGHT ET AL., *supra* note 3, § 1901, at 228; *see supra* note 3 and accompanying text (indicating formal means of intervention, under federal system, was not developed until early 20th century).

58. Krislov, *supra* note 1, at 699 (detailing other informal methods employed by federal courts to represent third-party interests).

59. Krislov, *supra* note 1, at 699.

60. *See infra* note 61 and accompanying text (discussing emergence of representation of third-party governmental interests).

proceedings.[61] Federal courts allowed the U.S. Government to intervene "by way of suggestion" in cases calling into question governmental authority.[62]

Eventually, informal judicial actions protected private individual rights and interests jeopardized by the adjudication of private suits, when the person seeking intervention lacked party status.[63] A court, through exercise of the "inherent power to control its processes," could allow a party seeking intervention a voice of some sort in the action before it.[64] Often this form of third-party participation mirrored the common law amicus and allowed the party leave to file a written brief.[65] Such judicial forms of relief, however, were rare; they were available where the lack of representation would cause obvious injustice.[66]

Federal court development of the amicus curiae device was a direct result of the absence of a formal method of third-party intervention.[67] Despite the apparent need for a means of third-party intervention, the appearance of the amicus in federal courts was not instantaneous.[68] Rather, the amicus curiae did not make its first appearance in the federal judicial system until the early 1820s. But when the amicus did emerge on the federal level, it was unlike its original common law ancestor. The amicus was no longer exclusively an impartial judicial servant.

It is ironic that in the amicus curiae's first appearance in federal court, the Supreme Court permitted the amicus to exercise greater power than usually permitted today. In *Green v. Biddle*,[69] a federal court permitted Henry Clay, the great orator and advocate of states'

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61. *See* Stratton v. Jarvis, 33 U.S. (8 Pet.) 4, 9 (1834) (granting U.S. Government form of intervention during in rem proceeding); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch.) 116, 144 (1812) (granting U.S. Government intervention, by leave of court, in admiralty proceeding); Angell, *supra* note 4, at 1018 (discussing how evolution of informal methods of third-party representation into amicus curiae concept resulted in blurred distinction between intervention and amici); Krislov, *supra* note 1, at 697-98 (stating that while jurisdiction was being restricted under federal judicial system, informal categories of third-party representation of governmental interests were being devised).

62. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 144 (granting intervention in admiralty proceeding); *see* Angell, *supra* note 4, at 1018 (linking informal method of intervention in *The Schooner Exchange* to emergence of amicus curiae in federal courts).

63. *See* Krislov, *supra* note 1, at 699 (describing early informal methods of representing third-party interests).

64. *See* Krippendorf v. Hyde, 110 U.S. 276, 283 (1884) ("The equitable powers of courts of law over their own process to prevent abuse, oppression, and injustice are inherent.").

65. Krislov, *supra* note 1, at 699.

66. Krislov, *supra* note 1, at 699.

67. *See supra* notes 57-66 and accompanying text (discussing informal methods of relief and concluding such methods were inadequate).

68. *See infra* note 69 and accompanying text (noting that federal courts' initial use of amicus curiae occurred in 1820s with case of *Green v. Biddle*).

69. 21 U.S. (8 Wheat.) 1, 17-18 (1823).

rights, acting as an amicus curiae, to file a motion to rehear a case involving the State of Kentucky's land holdings in which Kentucky was unrepresented.[70] The Supreme Court granted Clay's request.[71] The Court later permitted Clay, as amicus, to argue before a federal court.[72]

Clay's role in *Green* was dissimilar to the common law's amicus device.[73] Instead, *Green*'s amicus device resembled a modern day intervening party.[74] It appears that the flexibility of the amicus concept continued to play a role in its use. The Supreme Court, faced with a system that did not welcome intervention and confronted with a potentially inflammatory situation, utilized the amicus device's malleable characteristics to surpass the constrictions placed upon the Court by the adversarial and political processes.[75]

This first federal court appearance of the amicus curiae was not without consequence. Several commentators have attributed the wide scope of power demonstrated in *Green*[76] to the development of

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70. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 17-18 (1823). *Green* was the largest land case of the time, culminating decades of confusion resulting from conflicting land patents from both Kentucky and Virginia. TACHAU, *supra* note 36, at 185. Due to this confusion, *Green* perhaps presented the most opportune time for the amicus curiae to emerge in the federal courts. A variety of interests were at stake in the Kentucky land disputes. There were multiple claimants to each parcel of land, *id.* at 174, questions of conflicting state statutes, *id.* at 170-71, questions of which body of law applied, *id.* at 182-83, and disputes as to whether state or federal courts had jurisdiction. *Id.* at 185-86 (indicating that at time of *Green*, federal courts had broad view of their own jurisdiction in such cases). Considering the great number of potential points of conflicting interests, it is not surprising that the amicus curiae made its first appearance in a western land dispute.

71. *Green*, 21 U.S. (8 Wheat.) at 17.

72. Krislov, *supra* note 1, at 700-01.

73. *See* Krislov, *supra* note 1, at 700-01 (discussing unusual grant of amicus' petition for rehearing).

74. *See* Koch, *supra* note 5, at 155 (identifying intervening party as someone with direct interest in suit with all rights or liabilities to judgment between original parties).

75. *See supra* note 70 (detailing scope of potential interests at conflict in *Green*).

76. Today, such a party would probably be protected under Rule 19 of the Federal Rules of Civil Procedure or be able to intervene under Rule 24 once the action commenced. At that time, however, and even by today's standards, allowing an amicus to exercise such powers was exceptional. *See* Krislov, *supra* note 1, at 701 (arguing that because amicus is not party to litigation, most jurisdictions in 20th century would not permit amicus to file motion for rehearing). Modern courts occasionally permit an amicus curiae to partake in oral arguments or, in some circumstances, present evidence. *See* Howard v. Illinois Cent. R.R., 207 U.S. 463, 469 (1908) (permitting U.S. Department of Justice to take part in both written and oral argument); Gerritsen v. De La Madrid Hurtado, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987) (granting Mexican Consulate amicus status in order to avail court of Consul's legal arguments); United States v. Loew's Inc., 136 F. Supp. 13, 14 (S.D.N.Y. 1955) (allowing amicus curiae to present proof in antitrust case); Durkin v. Pet Milk Co., 14 F.R.D. 374, 381 (W.D. Ark. 1953) (bestowing right to engage in oral arguments in lieu of intervention on amicus curiae). *But see* Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981) (holding that in absence of exceptional circumstances amicus curiae cannot introduce additional evidence), *cert. denied*, 456 U.S. 905 (1982). The court has discretionary power to control amicus participation. *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (positing that court has broad power in appointing amici curiae); Pennsylvania Envtl. Defense Found. v. Bellefonte Borough, 718 F. Supp. 431, 434-35 (M.D. Pa. 1989) (suggesting court has broad

an often blurry distinction between intervening parties and amicus curiae status.[77] In fact, courts today still debate the appropriate line between a trial level amicus and an intervening party.[78]

### *C. Present Status of Amicus Device Under Federal Law*

Over the course of 170 years, the amicus curiae has become a fixture of our federal judicial system.[79] In fact, amici commonly appear at all levels of the federal judicial system, from district courts to the U.S. Supreme Court.[80] Despite the frequency in which amici appear in our nation's courtrooms, courts still avoid attaching a rigid definition to the role the amicus curiae plays in the litigation process.[81] In fact, confusion exists in defining the proper role or

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discretionary power in control of amici). Most courts, however, would not permit the amicus curiae to request rehearing or appeal. *See* Moten v. Bricklayers, Masons & Plasterers Int'l Union of Am., 543 F.2d 224, 227 (D.C. Cir. 1976) (finding amicus curiae could not appeal from final judgment); Denver v. Denver Tramway Corp., 23 F.2d 287, 295 (8th Cir. 1927) (forbidding amicus curiae to change venue, object to court rulings or seek rehearing); United States v. Louisiana, 718 F. Supp. 525, 528 (E.D. La. 1989) (holding amicus curiae lacks standing to prosecute any rehearing or appeal); City of New Orleans v. Liberty Shop, Ltd., 101 So. 798, 799 (La. 1924) (reasoning that because amicus is not party, amicus cannot seek rehearing); Board of Comm'rs v. Baker, 48 So. 654, 656 (La. 1909) (finding amicus curiae has no standing to seek rehearing); *In re* McClellan's Estate, 129 N.W. 1037, 1038 (S.D. 1911) (positing that amicus has no power to institute proceeding, change venue, appeal, or seek rehearing of case).

77. *See* Angell, *supra* note 4, at 1018 (stating use of enhanced party-like powers by amici resulted in blurring distinction between intervening party and amicus curiae status); Krislov, *supra* note 1, at 701 (indicating *Green v. Biddle* abrogated principle that amicus curiae acts for no one and is example of how distinction between intervention and amicus devices is often blurred).

78. *Compare* United States v. Michigan, 940 F.2d 143, 163-68 (6th Cir. 1991) (discussing traditional role of amicus curiae and finding that district court erred by crossing line of intervening party when empowering amicus) *with* EEOC v. Boeing Co., 109 F.R.D. 6, 7 n.2 (W.D. Wash. 1985) (creating "hybrid" form of amicus that falls between traditional amicus curiae and full-party).

79. *See* Harper & Etherington, *supra* note 4, at 1172-73 (indicating that increased filings of amicus briefs led Supreme Court to enact formal rules limiting them); SUP. CT. R. 36 (noting that amicus briefs are not favored). In addition, the Federal Rules of Appellate Procedure provide formal means by which amicus curiae may participate in appellate proceedings. FED. R. APP. P. 29. Today, amicus curiae activity is most visible at the Supreme Court level, both in number and adversarial content. Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 1-5 (1991) (detailing usefulness and frequency of social science amicus curiae briefs); Susan Behuniak-Long, *Friendly Fire: Amici Curiae and* Webster v. Reproductive Health Services, 74 JUDICATURE 261, 261-62 (Feb.-Mar. 1991) (indicating that 78 amicus curiae briefs were filed in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)); *1990-91 Amicus Scorecard*, N.J. L.J., Aug. 29, 1991, at 69 (breaking down major public interest groups that normally file amicus curiae briefs with Supreme Court and indicating each group's "won/lost" record).

80. *See* WASBY, *supra* note 1, at 110-11 (describing wide amici participation on all levels of federal courts). In fact, the limited nature of amicus influence has encouraged public interest groups to enter into key cases earlier, focusing on the trial court as well as appellate level. *Id.* at 111. Control is attained through active shaping of the issues and record at the trial. *Id.* As a result, early involvement may enable an interest group to mold a case to ensure that it is directly in line with the goals of the group. *Id.*

81. One general notion has prevailed though—the amicus is not a party to the litigation.

function to be performed by the amicus at the district court level. Courts have allowed the amicus to engage in a variety of activities ranging from nonbiased participation to invoking judicial power and prestige.[82] The need for judicial flexibility may account for the continued absence of a set definition of the amicus device.

Despite the existence of Federal Rules allowing third-party practice within federal district courts, problems still confront the judiciary. Members of today's bench are still troubled by those groups who out of fairness should be allowed a voice in federal judicial proceedings, yet who fail to surmount the barrier of Article III's standing requirement or meet the Federal Rule's intervention requirements.[83] In addition, new innovations in third-party practice have placed great strains on federal courts. Large unwieldy matters, involving multiple parties and complex issues—socially, factually, or scientifically—demanded more precious judicial time and resources.[84] While the complexity of cases grew, the methods of judicial resolution remained stagnant and tied to traditional notions of the adversarial judicial process.[85] The use of the amicus curiae provided a potential solution to some of these difficulties.[86]

Even though a set definition of an amicus does not exist, two gen-

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*See, e.g.*, New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (describing amicus curiae as nonparty that provides information and assistance); Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) (stating amicus curiae is not party to suit); United States v. Smith, 686 F. Supp. 847, 853 n.9 (D. Colo. 1988) (stating clear precondition for amicus is that person not be party to suit); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (declaring amicus is not party to litigation but rather is impartial servant of court). Participation does not, in and of itself, grant standing as a party. Munoz v. County of Imperial, 667 F.2d 811, 816-17 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982); *see* 3A C.J.S. § 7, at 429-31 (stating amicus curiae is not bound by res judicata). Courts have, however, on occasion granted amici curiae the power to perform functions similar to those of a party. *See infra* note 5 and accompanying text (describing trend of modern courts to grant party-like powers to amici curiae).

82. *Compare* United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991) (recognizing that classical amicus participation was impartial involvement to serve courts) *with In re* Estelle, 516 F.2d 480, 486-87 (5th Cir. 1975) (allowing U.S. Government, as amicus curiae, to enforce federal laws), *cert. denied*, 426 U.S. 925 (1976); United States v. Michigan, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (permitting amicus curiae to enforce consent decree).

83. *See* FED. R. CIV. P. 24 (allowing intervention if there is either statute conferring right to intervene or situation where disposition of case would impair interest of potential intervenor).

84. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4 (1977) (discussing additional roles taken on by courts in complex areas).

85. *See id.* at 49-50 (criticizing courts for habit of ignoring important social policy questions in instances where courts cannot resolve issues without abandoning their traditional judicial role); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357 (1991) (arguing that traditional adversarial concepts of adjudication are inadequate and incapable of creating effective relief in public law litigation).

86. Sturm, *supra* note 85, at 1373-74 (detailing how litigating amicus device presents potential way of involving interested actors within adversarial judicial process to reach consensual remedies of public law violations).

eral categories of amici curiae have emerged.[87] The first group is comprised of governmental units, such as the Federal Government and its component branches.[88] The second group is comprised of individuals or groups representing private interests.[89] Review of the amici curiae activity within these two categories reveal marked differences in the roles and powers such amici may possess. The initial observation is that governmental entities, as amicus, enjoy both greater access to federal courts,[90] and once present, have been able to enjoy a greater range of power than their private counterparts.

### *1. General contours of private party amicus curiae*

In most instances, courts have allowed private amici, representing either private economic or public interests, only a limited role in the litigation of important social issues in which the groups lacked standing as a party. Although allowed to abandon their common law trait of impartiality,[91] private amici have been limited to provid-

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87. *See, e.g.*, Angell, *supra* note 4, at 1019 (stating amici fall within three major categories: legal representatives of governmental bodies, private organizations representing professional or economic interests, and private associations purporting to speak for broad public needs); Krislov, *supra* note 1, at 699, 702 (indicating that amicus curiae device was used to represent both governmental interests and interests of private persons and organizations); Comment, *Amicus Curiae*, *supra* note 4, at 480-81 (listing three types of amici curiae: governmental amici, public spirited amici that promote altruistic goals such as civil liberty, and private special interest groups such as trade or commercial groups).

88. *See* WRIGHT ET AL., *supra* note 2, § 3975, at 435 (1977) (indicating federal appellate courts grant governmental bodies greater access to appellate proceedings as amici curiae than private amicus groups); *see also* Comment, *Amicus Curiae*, *supra* note 4, at 480 (arguing widespread practice of granting governmental amici easier access to private suits is justified by fact governmental amici represent view of general public welfare and are better able to predict wide range effects of contemplated adjudication).

89. *See* Comment, *Amicus Curiae*, *supra* note 4, at 481 (distinguishing between private amici who represent public interests and those advancing their own economic interests, and arguing that public-oriented amici provide more valuable views).

90. *See* Comment, *Amicus Curiae*, *supra* note 4, at 480 (stating that it is widespread practice to relax preliminary requirements for governmental units seeking to participate in litigation as amicus curiae); Beckwith & Sobernheim, *supra* note 24, at 42 (indicating ease with which governmental groups gain amicus status). Governmental amici participation at the appellate level provides a prime example of the greater level of access to courts. The formal rules adopted by the Supreme Court for its own use, and those it helped promulgate for the federal courts of appeals allow governmental units to file amicus briefs without leave of the parties or the court. SUP. CT. R. 36.4; FED. R. APP. P. 29. On the other hand, these same rules require private persons or groups to obtain consent of both parties, or leave of the court to file. SUP. CT. R. 36.4; FED. R. APP. P. 29.

91. *See supra* notes 33-36 and accompanying text (discussing initial departure from impartiality requirement); *see also supra* notes 75-77 and accompanying text (indicating that impartiality requirement was quickly abandoned by federal courts). Some courts, however, still generally define private-party amici curiae as a "friend of the court" and require impartiality. *See* United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991) (giving historical view of amicus as impartial friend of court but noting some courts allow limited adversarial support); Allen v. County Sch. Bd. of Prince Edward County, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961) (distinguishing amicus, as "friend of the court," from advocate for one side); Universal Oil

ing information to the courts,[92] raising jurisdictional and other important issues overlooked by the parties,[93] assuring the presentation of complete factual scenario,[94] and suggesting potential implications of the court's decision.[95]

In general, courts have limited the ability of private amici to exercise rights commonly reserved to parties. As a result, amici curiae, in most instances, have been precluded from filing pleadings,[96] en-

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Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946) (conditioning receipt of amici curiae compensation on impartial service to court and not partisan service). In such courts, the amici closely resemble their common law ancestor, and may be limited to the role of assuring that the court is fully informed on points of law. *Allen*, 28 F.R.D. at 362 n.2. These courts cite the duty to maintain honor of the court, by avoiding error, as grounds for amicus participation. *Id.*; *see Universal Oil Prods. Co.*, 328 U.S. at 580-81 (noting use of amicus to maintain honor of court); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (stating purpose of amicus is to serve court).

92. *See* Skandia Am. Reinsurance Corp. v. Schenck, 441 F. Supp. 715, 718 n.3 (S.D.N.Y. 1977) (permitting amicus curiae to provide information and expertise on matters beyond court's knowledge); 3A C.J.S. *Amicus Curiae* § 2 (1973) (stating courts have discretion of allowing amicus if they consider information offered to be useful); *see also supra* note 20 and accompanying text (explaining role of amicus curiae is to provide information).

93. *See* Teague v. Lane, 489 U.S. 288, 300, 330 (1989) (stating Court was free to address issue raised only in amicus brief); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (stating amicus curiae is not party to litigation, but participates only for benefit of court by insuring complete presentation of difficult issues). The importance of the issue-raising role of the amicus is great. Indeed, perhaps the most important case in criminal procedure, Mapp v. Ohio, 367 U.S. 643 (1961), which extended the Fourth Amendment to the states, owed its outcome to the American Civil Liberties Union's amicus brief. In *Mapp*, the parties focused exclusively on an obscenity issue. Only the amicus raised the question that the initial search was prohibited by the Fourth Amendment. *Teague*, 489 U.S. at 330, 331 n.3 (mentioning amicus involvement in *Mapp*).

94. *See* GOLDMAN & JAHNIGE, *supra* note 9, at 195-96 (noting that courts' need amicus curiae's role of development of facts in judicial process); JACOB, *supra* note 2, at 42 (mentioning amicus information providing role in presenting accurate factual background of matter). Providing information also helps to lessen the effects of the adversarial model of litigation. GOLDMAN & JAHNIGE, *supra* note 9, at 195-96. The adversarial method, by vesting control in the parties, places limitations on the factual information judges may receive. *Id.* The amicus curiae may thus expand the focus of the proceedings from a two-party proceeding into an objective search for truth. *See id.* at 195 (stating court's role is to rely on parties for development of facts, not to conduct independent search for truth).

95. *See* WASBY, *supra* note 1, at 102-03 (stating amicus curiae involvement informs judges of broader implications and effects). The role played by private amici in providing information of the social implications of potential judicial decisions should not be undervalued. Courts should not, and cannot, rely solely on information provided by governmental sources. Angell, *supra* note 4, at 1023. Amici representing class or community interests are often required to create a complete image of social realities. *Id.* at 1022-23 ("[C]ourts cannot operate in an Olympian remoteness from the social scene."). In some instances use of private amici lessens such remoteness. *Id.*

96. *See* Baker v. Baker, 87 P.2d 800, 804 (Nev. 1939), *modified*, 96 P.2d 200 (Nev. 1939) (noting amicus allowed to file pleading in this instance because of extensive involvement in case as conservator); *In re* Perry, 148 N.E. 163, 165 (Ind. App. 1925) (finding that amicus curiae is not party to suit and, thus, may not file pleadings or exercise any control over litigation); 4 AM. JUR. 2D, *Amicus Curiae* § 3, at 111 (1962) (stating amicus cannot file pleadings and is restricted to making suggestions to court).

forcing consent decrees or judgments,[97] requesting rehearings,[98] or appealing a case in which it participated.[99] Additionally, if the decision is appealed, the court, at its discretion, may further limit the amici's ability to raise issues not presented by the parties, or engage in oral argument.[100] In many cases, such limitations on private amici power are a direct result of lack of standing.[101]

The limited nature of private amici curiae participation is not completely without benefit for the amici. Because the amicus curiae generally lacks party status[102] or the ability to control the course of the litigation,[103] the private amici can, in most instances, participate

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97. *See* EEOC v. Local Union No. 3, Int'l Union of Operating Eng'rs, 416 F. Supp. 728, 732 (N.D. Cal. 1975) (holding private parties have no right to enforce consent decree because they are not party to decree).

98. *See Ex Parte* Leaf Tobacco Bd., 222 U.S. 578, 581 (1911) (ruling that amicus curiae, because it lacked standing, was barred from seeking rehearing); United States v. Louisiana, 718 F. Supp. 525, 528 (E.D. La. 1989), *appeal dismissed*, 493 U.S. 1013 (1990) (finding amicus lacked standing to seek rehearing); City of New Orleans v. Liberty Shop Ltd., 101 So. 798, 803 (La. 1924) (stating no one but party to suit can apply for rehearing); Board of Comm'rs v. Baker, 48 So. 654, 658 (La. 1909) (setting aside grant of rehearing because it was given at request of amicus); Burns v. State *ex rel.* Allen, 173 P. 785, 786 (Wyo. 1918) (indicating that although amicus is not entitled to rehearing, request may be allowed when parties consent).

99. *See* Moten v. Bricklayers, Masons & Plasterers Int'l Union of Am., 543 F.2d 224, 227 (D.C. Cir. 1976) (dismissing appeal for lack of jurisdiction because appellant only participated as amicus); Hamlin v. Perticuler Baptist Meeting House, 69 A. 315, 319 (Me. 1907) (denying appeal by amicus because role of amicus is to raise issues and this was done in lower court).

100. *See* FED. R. APP. P. 29 (granting amicus privilege to participate in oral argument only where extraordinary circumstances are shown).

101. *See Local Union No. 3, Int'l Union of Operating Eng'rs*, 416 F. Supp. at 732 (finding lack of standing precludes amicus from seeking injunctive relief). The fact that the amicus is without sufficient personal stake or interest to confer Article III standing does not mean the amicus curiae is, or can be, totally without interest. *See* Covey, *supra* note 4, at 31 (stating amicus curiae must have some interest in litigation unlike party, or intervening party, who must have direct interest in res of suit); News & Sun-Sentinel Co. v. Cox, 700 F. Supp. 30, 31-32 (S.D. Fla. 1988) (noting need of "special interest" on part of amicus for participation); Donovan v. Gillmor, 535 F. Supp. 154, 159 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982) (denying public interest group participation as amicus because of lack of sufficient interest). The required interest may be the representation of the public interest, pointing out error to the court, or the resolution of similar issues in other related suits. Covey, *supra* note 4, at 31. Indeed, it is rare that a court will find an amicus to lack such a degree of interest as to preclude participation. *See* American College of Obstetricians & Gynecologists v. Thornburgh, 699 F.2d 644, 645 (3d Cir. 1983) (finding group of law professors, who did not represent group or cognizable interest, were not entitled to participate as amici curiae); United States v. Winkler-Koch Eng'g Co., 209 F.2d 758, 759 (C.C.P.A. 1954) (finding interest in similar law suit is insufficient interest to warrant participation as amicus). *But see* Eugene R. Fidell, *Befriending the Court: A Few Words on Amicus Briefs*, LEGAL TIMES, Sept. 5, 1983, at 9 (questioning wisdom of *Thornburgh* decision).

102. *See* Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982) (denying amicus' request for attorney's fees due to fact that extensive participation did not make amicus party to litigation); *see also supra* note 81 (listing several cases in which courts noted amicus was not party to litigation).

103. *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (indicating amicus participation, even though exercising greater power than normal, was appropriate where amicus did not control course of litigation); Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973) (denying United States, acting as amicus, ability to control litigation to extent of requesting relief separate from plaintiff).

in the suit free of the effects of res judicata.[104] In this sense, the amicus may freely raise the same issues and arguments in subsequent litigation, thus potentially serving a wider group of its members or general public.[105] The importance of the amici curiae's ability to evade res judicata in the development of new law should not be understated.[106] One can only grimace at the thought of the American Civil Liberties Union or other civic groups, acting as amici, being precluded from raising prior unsuccessful arguments; there is always the chance that today's unsuccessful argument may eventually gain favor within the judiciary and become tomorrow's law.

### 2. *Governmental bodies acting as amici curiae*

Compared to their private counterparts, federal or state governmental units have traditionally enjoyed greater leeway in their participation as amicus curiae before federal courts.[107] Courts have recognized the need and benefit of involving other state, federal, and even foreign governmental bodies in litigation implicating areas of public interest.[108]

First, governmental bodies, acting as amicus curiae, possess unparalleled institutional expertise and constitute a valuable means of

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104. *See* Munoz v. County of Imperial, 667 F.2d 811, 816-17 (9th Cir.) (finding simple amicus status does not bind nonparty), *cert. denied*, 459 U.S. 825 (1982); TRW, Inc. v. Ellipse Corp., 495 F.2d 314, 318 (7th Cir. 1974) (noting amicus is only bound by res judicata if there is privity between amicus and litigant); Cory Corp. v. Sauber, 267 F.2d 802, 803 (7th Cir. 1959) (denying request for amicus to intervene as amicus because amicus would not be bound in later litigation), *rev'd on other grounds*, 363 U.S. 709 (1960); 3A C.J.S. *Amicus Curiae* § 7, at 429-31 (1973) (stating that because amicus is not party to case or responsible for its management, amicus participation does not constitute final determination of rights); *see also* WRIGHT ET AL., *supra* note 3, § 4451, at 427 (suggesting that most direct basis for applying res judicata against nonparty consists of degree of participation and amount of control nonparty enjoyed during course of litigation).

105. *See* JACOB, *supra* note 2, at 42 (noting how organizations can show concern of all their members without risking imprisonment or res judicata).

106. *See supra* note 93 (discussing significance of amicus curiae in *Mapp v. Ohio*).

107. *See* Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946) (expounding fact that federal courts may always call on executive branch to serve as amicus curiae to represent public interest); Faubus v. United States, 254 F.2d 797, 805 (8th Cir. 1958) (stating that it is customary for federal courts to call on executive branch for aid); Beckwith & Sobernheim, *supra* note 24, at 40-42 (indicating that general limiting principle placed on private amici does not apply to governmental amicus appearing to represent matter of public interest); George C. Piper, Note, *Amicus Curiae Participation—At the Court's Discretion*, 55 KY. L.J. 864, 870 (1967) (asserting that federal courts have allowed exceptions to normal amicus participation limitations for governmental amici where circumstances dictate).

108. *See, e.g.*, United States v. California, 332 U.S. 19, 26-27 (1947) (allowing U.S. Attorney General to bring case when governmental interests are at stake); Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) (noting court can always rely on governmental amici to provide information in matters of public interest); City of Grand Rapids v. Consumers' Power Co., 185 N.W. 852, 854 (Mich. 1921) (mentioning that court often calls on amicus in cases involving public interest).

determining how the court's decision may affect the world outside its chambers.[109] Furthermore, in instances where federal courts are engaged in setting social policy, the involvement of other governmental branches provides a legitimizing quality.[110] Where a court involves active participation of governmental bodies, the court retains an appearance of detached objectivity and enhances its image as decisionmaker, rather than policymaker.[111] Finally, a governmental amicus may lend the court executive powers necessary to enforce the court's decrees.[112] As a result, federal appellate courts have adopted a policy of permitting almost unfettered governmental amicus curiae involvement. The Supreme Court has espoused the principle that a federal district court may always call on a concurrent branch of government, as amicus curiae, to represent the public interest.[113]

The nature of the governmental amicus curiae's involvement at the federal district court level also varies from its private cousin, although their roles are similar.[114] Like private amici curiae, governmental amici commonly provide courts with information and advice.[115] Despite this general similarity, in the past the rare judicial

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109. Comment, *Amicus Curiae*, *supra* note 4, at 480.

110. *Cf.* Sturm, *supra* note 85, at 1365 (indicating that Government officials have political and legal concerns about preserving their decisionmaking authority when they are target of public policy driven litigation).

111. *See* Sturm, *supra* note 85, at 1358-59 (suggesting that propriety of judicial involvement is central to litigation and that parties assume that adversary process preserves judicial legitimacy).

112. *See* Bush v. Orleans Parish Sch. Bd., 191 F. Supp. 871, 875-76 (E.D. La.) (basing grant of power on fact that it was vital to justice), *aff'd*, 367 U.S. 908 (1961); Faubus v. United States, 254 F.2d 797, 804 (8th Cir. 1958) (approving court's grant of amicus status to U.S. Attorney General, and permitting amicus to submit pleadings, evidence, arguments, briefs, and to seek injunctive relief). As one court noted, the amicus may be entitled to greater privileges when it serves to protect the court, rather than a party. United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972).

113. Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946).

114. *See* Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (indicating generally no difference in private-party right to seek amicus status than that possessed by Government). *But see* Faubus v. United States, 254 F.2d 797, 805 (8th Cir. 1958) ("It has . . . always in the past been customary for a federal district court to call on the law officers of the United States for aid and advice . . . .").

115. Comment, *Amicus Curiae*, *supra* note 4, at 480. Courts are likely to be responsive to such aid because governmental amici are particularly apt in providing courts access to political, economic, and social data. *See id.* (reasoning that explanation for traditional ease in governmental amici's access to courts is attributed to possession of expertise, data, and broad social interest). Also, in many instances state or federal governmental bodies have provided both expertise, *see* Hubert v. Saucier, 347 F. Supp. 152, 154 (N.D. Ga. 1972) (providing complete court record to Department of Health, Education and Welfare to enable agency to provide expertise in case concerning public housing), and key advice to courts in creating new law and policy, *see* David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1167-70 (discussing how SEC played important role in shaping securities law due to its expertise, information, and unique position in securities market).

grant of near-party power clearly distinguished the two. Under some circumstances a governmental amicus, acting *like* a party, may seek to enforce a district court decision,[116] introduce and examine witnesses,[117] conduct discovery,[118] seek injunctions,[119] and petition for appeal or rehearing of a court's decision.[120] Yet there are limitations on instances where governmental amici curiae act in a near-party capacity. District courts may not allow the governmental amici to dictate the course of the litigation.[121] Furthermore, the governmental amicus may not turn one of the party litigants into its own "strawm[a]n," i.e., facilitate the ability of the amicus to present its own views.[122]

The existence of authority granting governmental entities party-like status, while not the norm, has the potential to create confusion at the trial court level.[123] Some courts and litigants have failed to recognize the disparity between private and governmental amici curiae by failing to see the distinctions particular to the governmental amici.[124] Specifically, the governmental amici's exercise of near-party powers is normally associated with an issue closely related to the basic structure of our federal system of government.[125] In other words, in instances of enhanced governmental amici activity, the

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116. *See* United States v. Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (noting even amicus curiae could seek enforcement of district court decision in desegregation case), *aff'd*, 495 F.2d 1250 (5th Cir. 1974).

117. *See* United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (allowing amicus to present and examine witnesses).

118. *See* Northside Indep. Sch. Dist. v. Texas Educ. Agency, 410 F. Supp. 360, 362-63 (W.D. Tex. 1975) (permitting United States, as amicus, to conduct discovery).

119. *See* Faubus v. United States, 254 F.2d 797, 804 (8th Cir. 1958) (granting U.S. attorney power to seek injunctive relief); Bush v. Orleans Parish Sch. Bd., 191 F. Supp. 871, 877 (E.D. La.) (permitting United States, as amicus curiae, to seek injunctive relief in school desegregation case), *aff'd*, 367 U.S. 908 (1961); Aaron v. Cooper, 163 F. Supp. 13, 16 (E.D. Ark.) (enabling governmental amicus to seek injunctive relief in desegregation case), *cert. denied*, 357 U.S. 566 (1958).

120. *See Northside Indep. Sch. Dist.*, 410 F. Supp. at 363 (rehearing case in order to provide amicus discovery opportunity to prove discriminatory intent).

121. *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (allowing governmental amicus to possess full range of party-like powers because court found that "[t]here is no indication, however, that amicus controlled the litigation, or that the inmates were mere strawmen to confer standing so that the amicus could litigate its views").

122. *Id.*

123. *See* Brief for Appellee, *supra* note 12, at 34-36 (describing lower court discretion as supporting claim of litigating amicus validity).

124. *See* United States v. Louisiana, 751 F. Supp. 608, 620 (E.D. La. 1990) (stating there is no difference between private persons and governmental units acting as amicus curiae); Brief for Appellee, *supra* note 12, at 36 n.28 (citing cases granting governmental units expanded amicus roles for proposition that litigating amicus curiae is valid status for private entities); *id.* at 37 (rejecting Michigan's attempt to distinguish *Knop* litigating amicus from governmental amici and arguing such distinction is false since ACLU also participated as amicus in several of these cases).

125. *See supra* notes 69-78 and accompanying text (suggesting amicus curiae device may be used to overcome defects in federal judicial system).

core issue usually involves questions concerning the distribution of power between the states and central government,[126] the distribution of power within our Federal Government,[127] or inter-branch cooperation and assistance within the Federal Government.[128] In such instances, the judicial use of the amicus device to achieve protection of governmental interests reflects the traditional flexibility attached to the amicus curiae device.[129] Courts grant amicus status in instances of grave importance, when standing is otherwise questionable, to assure adequate representation of governmental interests or to correct widescale violations of civil wrongs.[130]

The hyper-governmental amici activity, bordering on near-party status, has not gone unnoticed. Due to the vague "discretion of the court" standard for trial level activity[131] and a failure to recognize

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126. *See, e.g.*, United States v. Yonkers Contracting Co., 697 F. Supp. 779, 781 (S.D.N.Y. 1988) (allowing local government to file amicus brief in criminal case to help protect interests in collateral civil action); United States v. Ward, 618 F. Supp. 884, 915 (E.D.N.C. 1985) (permitting North Carolina to appear as amicus curiae to support constitutionality of state statute); Wilson v. Al McCord Inc., 611 F. Supp. 621, 622 (W.D. Okla. 1985) (enabling state securities agency to provide information concerning application of state law), *aff'd in part, rev'd in part*, 858 F.2d 1469 (10th Cir. 1988); Mir v. Smith, 521 F. Supp. 446, 456 (N.D. Ga. 1981) (entitling Florida to participate as amicus curiae over settlement of Cuban refugees due to drain on state's resources, but limiting further intervention); United States v. Massachusetts Maritime Academy, 76 F.R.D. 595, 598 (D. Mass. 1977) (allowing state commission to respond to federal discrimination allegations, but refusing intervention).

127. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (determining scope of executive powers as against powers of Congress and individual rights).

128. *See* Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.) (permitting members of U.S. House of Representatives to appear as amicus curiae to convey importance of legislative-granted immunity to legislative process), *cert. denied*, 476 U.S. 1141 (1986); League of Women Voters of Cal. v. FCC, 489 F. Supp. 517, 518 (C.D. Cal. 1980) (allowing Senate members to appear in order to assert constitutionality of federal act); *see supra* notes 116-20 and accompanying text (citing cases where executive branch lent its enforcement power to federal courts' attempt to uphold Constitution).

129. *See supra* notes 16-18 and accompanying text (discussing flexibility of amicus device).

130. *See* SEC v. United States Realty & Improvement Co., 310 U.S. 434, 460 (1940) (permitting SEC to participate, where standing was questionable, due to public interest associated with corporate reorganizations). The governmental body may lack standing under Article III, yet the determination of the issue may have far reaching effects on the government's ability to function normally or efficiently. *Id.* In such cases, the decision may create inconvenient precedent, but not rise to the level of having a binding effect upon the governmental entity. *Id.*

In addition to preserving governmental values, prevention of wide scale violations of civil rights has also encouraged courts to expand amicus activity. In fact, the Fifth Circuit specifically recognized the utility in having the U.S. Government acting as quasi-party/amicus in order to protect individual rights. *In re* Estelle, 516 F.2d 480, 487 n.5 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976). The court stated:

> Participation by the United States has been appropriate in these cases not only to vindicate the federal interests . . . but to insure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they claim they have been deprived. . . . I would not be comfortable with the obvious result—that only minor constitutional deprivations on a small scale could be successfully vindicated, while wide spread . . . deprivations went uncured due simply to the awesome magnitude of their evil.

*Id.*

131. *See* Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) (denying petitioner's leave

the key differences between the two categories of amicus activity, courts have set the stage for confusion concerning the proper function of amicus curiae activity in federal district courts. The authority bestowing quasi-party powers on governmental amici curiae eventually led courts and parties to attempt to mold the amicus curiae into a new status of litigant within federal courts.[132]

## II. THE EMERGENCE OF THE LITIGATING AMICUS

By the early 1980s, all the components dictating a further expansion of the amicus curiae device were present. Among these components were early federal precedent confusing intervention with the amicus status, vague judicial standards guiding the use of the amicus curiae, and the device's long tradition of flexibility.[133] Along with these lines of authority, several other factors set out a favorable judicial climate for further evolution of the amicus device. In the 1980s, federal courts witnessed crowded dockets, Supreme Court decisions limiting federal jurisdiction, and moves to bring federal litigation back to a true adversarial model.[134] Furthermore, social factors led to an explosion in prison populations while strapped state treasuries struggled to maintain educational and mental health institutions.[135] These social factors created large complex cases, including prisoners' rights and school desegregation cases, with multiple layers of governmental involvement and issues that gripped America's social conscience. Thus, federal courts were faced with sensitive cases requiring large amounts of judicial resources concurrently with limitations on the number of parties that could become involved in the decisionmaking process. They also were faced with

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to intervene, stating that, even if she had asked for amicus status, trial court decision is not reviewable); Ginsburg v. Black, 192 F.2d 823, 825 (7th Cir. 1951) (holding that statements made by defendant in proceeding to grant amicus status are privileged and granting of amicus status is discretionary), *cert. denied*, 343 U.S. 934 (1952); *In re* Oskar Tiedemann & Co., 183 F. Supp. 129, 131 (D. Del. 1960) (stating that it is within court's discretion to deny amicus status to tanker industry representative in case involving liability for collision), *aff'd*, 289 F.2d 237 (3d Cir. 1961); State *ex rel.* Bennet v. Bonner, 214 P.2d 747, 751 (Mont. 1951) (noting that right of amicus to be heard is not dependent on consent of parties and is within discretion of court); *supra* notes 20-21 and accompanying text (indicating long tradition of discretionary standard).

132. *See* United States v. Michigan, 116 F.R.D. 655, 660 (W.D. Mich. 1987) (elevating amicus curiae to status of litigating amicus curiae, but refusing to allow amicus to intervene as party to action).

133. *See supra* notes 69-78 and accompanying text (discussing *Green v. Biddle* and early confusion associated with amicus curiae activity and intervention); *supra* note 16 and accompanying text (indicating that central concept of amicus curiae evolution has been flexibility).

134. *See* Sturm, *supra* note 85, at 1389 n.185 (indicating that Supreme Court has sought to reestablish formalistic linkage between traditional adversarial model of litigation and public law-type cases).

135. *See* W. John Moore, *Paying for Punishment*, 19 NAT'L L.J. 621, 621 (1987) (noting prisons are fastest growing component of state budgets).

limited measures to resolve matters before them. It was inevitable that federal courts would once again look to the amicus curiae device for a temporary solution. Ultimately, the litigating amicus curiae emerged and assumed a role within the federal judicial system.

### *A. The Evolution of the Litigating Amicus*

Faced with the social problems of the late 1970s and early 1980s, federal courts began to permit, and in some instances require, governmental units to enter litigation as a hybrid form of amicus curiae status.[136] In these instances, federal courts encouraged governmental amici to take aggressive adversarial roles in civil rights litigation.[137] From the beginning, these governmental amici, later dubbed litigating amici, functioned as information gathering devices. They were allowed to gather and submit evidence to the courts.[138] Later, in instances where state and local cooperation were lacking, federal courts empowered the governmental amici to exercise all the powers of a party opponent.[139]

Federal district courts based the creation of the litigating amicus on two premises: first, that the creation and implementation of the amicus curiae are within the trial court's sole discretion;[140] and second, that the federal judiciary is always free to call on the executive branch to represent the public interest.[141] Throughout the gradual

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136. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (ordering U.S. Department of Justice to participate in case as amicus with full-party rights and advise court on matters of public interest); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir.) (inviting U.S. Department of Interior to participate as amicus curiae/intervenor at trial level to lend expertise in matters concerning Indian relations), *cert. denied*, 444 U.S. 866 (1979); *In re* Estelle, 516 F.2d 480, 482 (5th Cir. 1975) (ordering United States "to appear in the case as *amicus curiae* '[i]n order to investigate fully the facts alleged in the prisoners' complaints' "), *cert. denied*, 426 U.S. 925 (1976); DeVonish v. Garza, 510 F. Supp. 658, 659 (W.D. Tex. 1981) (denying motion to dismiss U.S. Department of Justice as litigating amicus); Wyatt v. Stickney, 344 F. Supp. 373, 375 n.3 (M.D. Ala. 1972) (thanking governmental amicus for role in proposing standards for meeting constitutional requirements), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

137. *See Hoptowit*, 682 F.2d at 1260 (granting U.S. Department of Justice, acting as litigating amicus, full-party rights in case involving unacceptable prison conditions).

138. *Id.*; *see In re* Estelle, 516 F.2d at 482 (noting trial court ordered United States to participate with full rights of party to fully investigate facts).

139. *See Hoptowit*, 682 F.2d at 1260 (allowing U.S. attorney as amicus to participate fully in discovery, trial, and appeal because amicus was not controlling litigation); *In re* Estelle, 516 F.2d at 482 (denying petition to stop United States, as amicus, from participating like party in case); Northside Indep. Sch. Dist. v. Texas Educ. Agency, 410 F. Supp. 360, 363 (W.D. Tex. 1975) (permitting governmental amicus additional opportunity to conduct discovery to assist in showing discriminatory intent); United States v. Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (permitting United States, in role of amicus, to initiate enforcement hearing to assure compliance with prior court proceedings).

140. *See supra* note 131 and accompanying text (referring to traditional discretionary standard applicable to court regulation of amicus curiae activity).

141. *See supra* notes 107-13 and accompanying text (discussing *Root Ref. Co.* line of cases and close relationship between executive and judicial branches when civil rights are at stake).

creation of the hybrid litigating amicus, courts failed to explicitly distinguish the governmental litigating amici curiae from their private counterparts. As a result, these decisions left open the possibility of allowing private entities, most notably public interest groups, to step out of their more constrained roles of information providers into a more active role in the litigation.

*1. The governmental body/private person mix*

The courts' initial failure to distinguish private and governmental amici curiae gradually led to private parties acting as litigating amici curiae. The first inroad to creating a new litigating status for private persons occurred in *Wyatt v. Stickney*.[142] In *Wyatt*, patients from a state mental institution filed a class action suit against the State of Alabama.[143] The court in *Wyatt* found that involuntarily committed patients had a constitutional right to receive sufficient care and treatment leading to their eventual recovery and freedom.[144] The court then set out to establish the proper remedy to bring the facility within constitutional parameters.[145] At both the liability and remedial stages of the trial, Chief Judge Johnson allowed several amici to take active roles in the proceedings.[146] The U.S. Department of Justice, the American Civil Liberties Union, and several private organizations served as amici curiae.[147] They gave testimony, engaged in the briefing process, and proposed and negotiated for the plans aimed at meeting the minimal constitutional standards of care.[148] Although the district court's opinion did not refer to the amici in the case as litigating amici curiae, several commentators have attached the label.[149] The significance of the *Wyatt* case emerges from the fact that it was the first case in which a governmental body and private person were allowed to act together as litigating amici.

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142. 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

143. Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972).

144. *Id.*

145. *Id.* at 374-76.

146. *Id.* at 375.

147. *Id.* at 375 n.3.

148. *Id.*

149. *See* Phyllis P. Dietz, Note, *The Constitutional Right to Treatment in Light of* Youngberg v. Romeo, 72 GEO. L.J. 1785, 1801 (1984) (discussing how U.S. Department of Justice has played expanded role, including acting as litigating amicus, in forty cases involving mentally disabled persons, one of these cases being *Wyatt*); John K. Cornwell, Note, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 YALE L.J. 845, 845 (1988) (noting that U.S. Department of Justice has served in role of litigating amicus to assist plaintiffs in institutional suits); *see* Brief for Appellee, *supra* note 12, at 36 n.28 (citing *Wyatt* as case in which court appointed litigating amicus curiae).

Within a few years, federal courts expanded the power of the amicus curiae. In *Equal Employment Opportunity Commission v. Boeing Co.*,[150] the Western District of Washington bestowed hybrid amicus status on a group of airline pilots.[151] In *Boeing*, the Equal Employment Opportunity Commission (EEOC) brought an age discrimination suit on behalf of former Boeing pilots.[152] Later, an additional group of former Boeing pilots sought to intervene.[153] The court held that the group of would-be-intervenors did not possess the legal interest needed to intervene because federal law vested all such power in the EEOC.[154] Recognizing the group's practical interest in the suit, however, the district court crafted an intermediary amicus status for the pilots.[155]

Under the court's judicial creation, the litigating amici were to serve like co-counsel to the EEOC.[156] The amici were entitled to participate in the trial, to receive all pleadings for purposes of scheduling hearings and depositions, to consult with the EEOC prior to finalizing any proposed settlement, to engage in discovery along with the EEOC, and to be present at all depositions.[157] Despite these abilities, the amici could not independently conduct discovery or engage in motion practice.[158] Most important, the amici were not empowered with the ability to reject the final proposed settlement, despite their active involvement.[159]

The *Boeing* case went a significant step further than *Wyatt*. First,

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150. 109 F.R.D. 6 (W.D. Wash. 1985).

151. EEOC v. Boeing Co., 109 F.R.D. 6, 8 (W.D. Wash. 1985). The court in *Boeing* did not expressly state that the status was that of litigating amici curiae. Rather, the court called the pilots' status a hybrid. *Id.* According to the court, "[t]heir hybrid status falls somewhere between that of an *amicus* and an intervenor, both of which grew out of equity practice." *Id.* In fact, it was not until after a later case applying *Boeing* that commentators affixed the title litigating amicus to this hybrid amicus status. *See* EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 928 (N.D. Cal. 1987) (applying principles established in *Boeing* to grant litigating amicus status to attempted intervenors); *see also* Matthew Sloan, *Happy Landing for Former Pan Am Pilots*, AM. LAW., Apr. 1988, at 145 (indicating litigating amicus was involved in cross-examination of witness in federal district court); Gail D. Cox, *Pan Am. Pilots Settle in Latest Age Bias Case*, NAT'L L.J., Feb. 22, 1988, at 8 (stating attorney in *Pan American World Airways* acted as litigating amicus in representing interests of retired pilots in age discrimination suit); Fidell, *supra* note 101, at 8 (positing that in some cases amicus is able to participate as litigating amicus curiae at trial level).

152. *Boeing*, 109 F.R.D. at 8.

153. *Id.*

154. *Id.* at 9. The court found that although the pilots' futures were clearly affected by the suit in a significant way, the pilots lacked the formalistic legal interest. *Id.* This prompted the court to carve out this middle tier of third-party involvement. *See id.* (asserting that despite presence of legal interest for Rule 24 purposes, court would best serve justice by allowing participation of hybrid amici).

155. *Id.* at 11.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

the amici in *Boeing* were given near-party power without serving directly under a governmental amicus; the court gave the amici additional litigation abilities in their own right. Also, the court allowed the private amici to supplement the EEOC's position in the case, adding to it where the EEOC failed to fully represent the amici's interests.[160]

Finally, the court cited traditional equitable powers of federal district courts to justify its ability to grant amicus status.[161] According to the court in *Boeing*:

> The status of these pilots might properly be termed *amicus curiae*, although the court contemplates a role for their counsel that exceeds the traditional briefing function of an *amicus*. There seems to be no apt label. The pilots are not intervenors. They will have a limited role in the suit. Their hybrid status falls somewhere between that of an *amicus* and an intervenor, both of which grew out of equity practice. The court has merely drawn on these traditions of equity to tailor a role that suits the parties' purposes without expanding the statutory limits of the court's subject matter jurisdiction.[162]

Thus, the court in *Boeing* tied the modern version of the amicus curiae with the early use of the amicus in federal courts, such as in *Green v. Biddle*, to fashion a new litigation status representing interests that the present federal judicial structure unfairly excluded from the decisionmaking process.[163] The only difference between

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160. *Boeing*, 109 F.R.D. at 11.

161. *Id.* at 8 n.2.

162. *Id.*

163. *See supra* notes 70-78 and accompanying text (discussing Supreme Court's equitable use of amicus curiae status to achieve unavailable level of third-party practice and creating confusion over proper line between intervention and amicus activity). A later court relied on the *Boeing* decision in a similar EEOC-related matter. In *EEOC v. Pan American World Airways, Inc.*, the Northern District of California followed the *Boeing* case and skirted the dividing line between an intervening party and an amicus curiae. EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 928-29 (N.D. Cal. 1987). *Pan American World Airways* concerned an action brought by the EEOC on behalf of 81 former airline pilots challenging Pan Am's forced retirement policy for its pilots. *Id.* at 926. Several pilots, not happy with EEOC's representation, sought to intervene, or alternatively, to be allowed to act as an amicus. *Id.* After rejecting the group's motion to intervene, the court granted the pilots the ability to act as an enhanced amicus curiae. *Id.* at 928. The court in *Pan American World Airways* court built upon the court's amicus concept in *Boeing*. First, in *Pan American World Airways*, the court directly rejected Pan Am's contention that broad amicus powers are only appropriate for governmental entities charged with representing the public interest and not private litigants. *Id.* The court thus ignored the classic distinction between private and governmental amici and left the door open for future confusion. In addition, the court in *Pan American World Airways* devised a three-factor analysis to justify its grant of hybrid amicus status. *Id.* The court considered:

> (1) whether the original parties adequately represent the amicus' interests;
> (2) whether the amicus would provide the court needed perspective and expertise; and
> (3) whether any of the litigants welcomes the amicus' participation.

*Green* and *Boeing* is the presence of established rules of third-party practice in the latter.[164] *Boeing* thus suggests that the use of the amicus device rests in common law precedent and is unhampered by the presence of the Federal Rules of Civil Procedure where the rules do not expressly limit it. Indeed, the court in *Boeing* indicated that the amicus creating power rests in a court's inherent power to ensure justice.[165]

### 2. *Crossing the threshold: the private litigating amicus without government sponsorship*

The first step toward a middle tier between amicus and full-party status for private litigants was not far off after the *Boeing* and *Wyatt* decisions. In *United States v. Michigan* (*Michigan Fishing Rights Case*),[166] the Western District of Michigan expressly created, for the first time, a private litigating amicus curiae, divorced from the power and prestige of a governmental entity.[167] The *Michigan Fishing Rights Case* involved a dispute over fishing rights and involved several Michigan Indian tribes, considered to be independent sovereigns under federal law, the State of Michigan, and the U.S. Department of Interior.[168] The case focused on whether Michigan's actions violated a 19th century treaty between the tribes and the Federal Government.[169]

The *Michigan Fishing Rights Case* possessed a unique level of complexity. The case was in federal court for twelve years, was presided over by two federal judges, and involved five governmental sover-

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*Id.* Under this analysis, the court concluded the grant was justified. *Id.* The litigating amicus also received some approval from the Ninth Circuit. *See* EEOC v. Pan Am. World Airways, Inc., 897 F.2d 1499, 1509 n.13 (9th Cir.) (recognizing amicus participation in trial proceedings and raising question of whether amicus would have ability to appeal adverse decisions), *cert. denied*, 111 S. Ct. 55 (1990).

164. *See* FED. R. CIV. P. 19-24 (establishing methods of representing third-party interests under federal judicial system).

165. *Boeing*, 109 F.R.D. at 11; *see* Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563 (3d Cir. 1985) (stating it is part of court's inherent powers to achieve justice and amicus activity is valid extension of this power); *see also* Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985) (reasoning that rules of civil procedure do not completely describe limit of district court's judicial power), *cert. denied*, 475 U.S. 1018 (1986).

166. 471 F. Supp. 192 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 451 U.S. 1124 (1981).

167. *See* Francis McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 463 (1986) (describing use of litigating amici in *Michigan Fishing Rights Case*). Judge Fox handled the early stages of the case, which are reported. *See* United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981). The case was later transferred to Judge Enslen. For a description of the later stages, see Sturm, *supra* note 85, at 1373-75; McGovern, *supra*, at 456-68; Rich Arthurs, *Master Land Settlement That Almost Got Away*, LEGAL TIMES, Apr. 22, 1985, at 1. The case concluded in 1985. McGovern, *supra*, at 465-66.

168. *See* McGovern, *supra* note 167, at 462-63 (describing interests of parties to litigation).

169. *See* McGovern, *supra* note 167, at 456-58 (setting out basis of dispute).

eignties.[170] In addition, several private groups of sport and non-tribal commercial fishermen sought access to the litigation and the settlement process.[171] Rather than permitting the private groups to intervene, Judge Enslen allowed them to participate as litigating amici.[172] The court entitled the litigating amici to participate in the settlement discussions, to help select a special master, and to participate in discovery.[173] The litigating amici, however, were not given the power to veto the settlement.[174] Thus, the private litigating amici were able to have input into the discussions, ensuring adequate representation of their own interests.[175] While this participation was adverse to each of the governmental entities, their total exclusion would have been detrimental to the amici's economic and recreational interests.

The *Michigan Fishing Rights Case* and other cases involving private litigating amici curiae once again tied the common law amicus device with the equitable principles of flexibility and representation of third parties.[176] In addition, the use of the litigating amicus in the *Michigan Fishing Rights Case* arguably provided a means of increasing judicial efficiency.[177] The device avoided spin-off litigation and allowed the judges to be better informed and monitor enforcement procedures. Despite the existence of rules concerning third-party practice, the judges in these cases used the litigating amicus device. Yet these cases did not violate the spirit of the Federal Rules of Civil Procedure. None of the private amici were granted powers and abilities on par with full parties to the litigation. Thus, the federal courts left strong incentives to rely on the Federal Rules to assure complete representation of their interests.

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170. *See* McGovern, *supra* note 167, at 457-58, 462-63 (detailing length and breadth of litigation). The sovereignties were three Indian tribes, the State of Michigan, and the United States. McGovern, *supra* note 167, at 462-63.

171. *See* McGovern, *supra* note 167, at 462-63 (describing groups seeking to intervene and reporting Judge Enslen's denial). Earlier, the previous judge, Judge Fox, denied the requests of two private groups to intervene, but ruled they could participate as traditional amici. United States v. Michigan, 89 F.R.D. 307, 308 (W.D. Mich. 1980).

172. McGovern, *supra* note 167, at 462-63.

173. McGovern, *supra* note 167, at 463. Professor McGovern served as the special master. Arthurs, *supra* note 167, at 1.

174. McGovern, *supra* note 167, at 463.

175. McGovern, *supra* note 167, at 463.

176. *See supra* notes 69-78 and accompanying text (reviewing effects of *Green v. Biddle* on equity and representation of third-party interests within federal courts); *supra* notes 160-64 and accompanying text (discussing how *Boeing* case tied together amicus device, equitable principles, and third-party representation).

177. *See* McGovern, *supra* note 167, at 463 (asserting that *Michigan Fishing Rights Case* was handled in innovative way and "ensured that all the key decisionmakers were present in the litigation"); *see also* United States v. Michigan, 116 F.R.D. 655, 663-64 (W.D. Mich. 1987) (justifying granting of litigating amicus status on grounds that defendants would save costs of litigating additional lawsuit and allow court to consolidate two actions).

*Boeing* and the *Michigan Fishing Rights Case*, however, did pose several problems to civil practice before federal trial courts. First, the cases failed to distinguish private and governmental amicus activity and the difference in magnitude of unrepresented interests involved in both.[178] Second, the cases failed to establish absolute boundaries for legitimate amicus curiae activity. It was unclear after these cases whether a private party could exercise power similar to a full-party and on par with judicially invited governmental amici. Finally, the courts failed to enunciate clear standards for conferring litigating status upon an amicus and the extent to which these powers should be limited in each case.

### *B. The* Michigan Prisons Case *Litigation*

At approximately the same time that the *Michigan Fishing Rights Case* was concluding, a prisoners' rights case was also unfolding in the Western District of Michigan before Judge Enslen. Once again, Judge Enslen was assigned a case that was socially and procedurally complex. Matters of federalism and the rights of unrepresented human beings were at issue. Judge Enslen turned to the litigating amicus device to aid in management of the case, enforcing the court's orders, and representing a class of prisoners caught in the middle of the litigation. The subsequent eight years of litigation illustrate the problems associated with the use of the litigating amicus device. The proper role of an amicus in the federal courts remained unanswered after countless hearings at the trial level and an appeal to the Sixth Circuit.[179] For this reason, the *Michigan Prisons Case* litigation represents an interesting case study of the evolution of amicus curiae activity. Here, in a procedural muddle,[180] the litigating

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178. *See supra* notes 107-13 and accompanying text (establishing distinction between private and governmental amici and highlighting policy reasons for allowing greater power to governmental amici).

179. Even the *Michigan Prisons Case*'s appellate history was complex. The Sixth Circuit withdrew its initial decision after it reached the advance copy of the Federal Reporter, Second Series. *See* 901 F.2d 503 (1990) (indicating that opinion was withdrawn before final publication). The Sixth Circuit then issued its new opinion several months later. *See* United States v. Michigan, 940 F.2d 143, 163-66 (6th Cir. 1991) (concluding that "trial court created mutant" and litigating amicus has no standing to exercise rights as named party or real party in interest). For the Sixth Circuit's initial opinion see United States v. Michigan, No. 88-1869, 1990 WL 46637 (6th Cir. Apr. 20, 1990) (unpublished opinion) (dismissing appeal of nonfinal district court order granting litigating amicus status for lack of jurisdiction). To avoid confusion between the prison litigation and the *Michigan Fishing Rights Case*, both involving the same parties, the Comment will refer to the prison litigation as the *Michigan Prisons Case*.

180. The *Michigan Prisons Case* litigation is a fine example of potential complexities surrounding prisoner's rights litigation. The case involved two sovereignties—the United States and the State of Michigan—as well as two amici in two parallel cases in two different federal district courts. *See Michigan Prisons Case*, 116 F.R.D. 655, 657, 657 n.1 (W.D. Mich. 1987) (describing participants in litigation). Extensive proceedings were held over the enforcement

amicus came directly to light and left in its wake what Judge Krupansky described as a "judicial Pandora's box."[181]

### 1. *Proceedings before the District Court for the Western District of Michigan*

In January 1984, the U.S. Department of Justice brought suit against the State of Michigan under the Civil Rights of Institutional Persons Act[182] over conditions of three Michigan state prisons.[183] Contemporaneous with the filing of the action, the U.S. Department of Justice sought to enter into a consent decree with the State of Michigan as an alternative to a lingering judicial battle.[184] Within weeks of the start of the U.S. Department of Justice's suit, a class of prisoners (the *Hadix* class) attempted to intervene in the action, and the ACLU Foundation of Michigan and the ACLU's National Prison Project (NPP) sought litigating amici status.[185] The court denied all of these requests and ultimately granted the three groups amicus curiae status.[186]

At about the same time that the NPP amicus sought entry to the *Michigan Prisons Case*, a second separate plaintiff class from one of the subject facilities (the *Knop* class) brought a 42 U.S.C. § 1983 suit against officials of Michigan Department of Corrections that raised many claims already under consideration in the *Michigan Prisons Case*.[187] The *Knop* class, also represented by the NPP, sought entry

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of a consent decree that the parties entered earlier. *Michigan Prisons Case*, 680 F. Supp. 928 (W.D. Mich. 1987) (collecting three years worth of district court opinions in *Michigan Prisons Case*). The amici participated throughout. *See, e.g.*, *id.* at 935-43, 949-53 (denying motions of prospective amici to intervene under Rule 24 of Federal Rules of Civil Procedure); *id.* at 957-62 (denying motion by amicus to amend defendant's plan to improve prison conditions); *id.* at 984-88 (allowing amicus to present witnesses).

181. *Michigan Prisons Case*, 940 F.2d 143, 167 (6th Cir. 1991).

182. 42 U.S.C. § 1997 (1988).

183. *See Michigan Prisons Case*, 940 F.2d at 145-50 (detailing procedural background of litigation).

184. *Id.* at 146. Judge Enslen acknowledged that prisoners' rights cases, much like school desegregation cases, have the potential to tax both the court and litigants for extended periods. *Michigan Prisons Case*, 680 F. Supp. 928, 944 (W.D. Mich. 1987) (Mar. 23, 1984 bench opinion of Enslen, J.). From the outset of the litigation, Judge Enslen appeared to welcome a proposed consent decree as a means of easing the potential burden of protracted litigation. *See id.* at 944-45 (expressing Judge Enslen's preference for settling lawsuits). Judge Enslen rejected the first consent agreement. *Id.* at 948-49. On July 16, 1984, the district court accepted a revised consent decree. *Michigan Prisons Case*, 940 F.2d at 147.

185. *Michigan Prisons Case*, 940 F.2d 143, 146 (6th Cir. 1991). The *Hadix* class, comprised of prisoners at a Michigan institution, was the plaintiff in a 42 U.S.C. § 1983 suit in the Eastern District of Michigan challenging conditions similar to those in the case before Judge Enslen. *Id.* at 146 n.3.

186. *Id.* at 146 (citing district court's rulings reported at 680 F. Supp. at 935-43).

187. *See generally* Knop v. Johnson, 700 F. Supp. 1457 (W.D. Mich. 1988) (reciting procedural history of case and relation to *Michigan Prisons Case*). Because *Knop* was a 42 U.S.C. § 1983 suit, the state of Michigan was not a defendant, as it was in the *Michigan Prisons Case*.

into the *Michigan Prisons Case* litigation under the intervention provision of Rule 24(a)(2) of the Federal Rules of Civil Procedure.[188] Finding that the *Knop* class failed to meet the requirement of timeliness under Rule 24(a)(2), the court rejected the class' motion.[189] Later, the court added and the parties approved a provision to the consent decree assuring the *Knop* class the ability to participate as amicus curiae in the *Michigan Prisons Case*.[190]

The provision added to the consent decree granted the amici in the *Michigan Prisons Case* broad litigation power.[191] Under this provision, the amici curiae were able to present witnesses and other evidence,[192] participate in oral argument,[193] and advise the court as to matters of party compliance.[194] Despite the court's generous grant

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*Id.* at 1459. In addition, a similar class of prisoners (the *Jansson* class) also sought to intervene. *Id.*

188. *Michigan Prisons Case*, 940 F.2d at 147 (discussing motions to intervene). The *Knop* class argued that its presence in *Michigan Prisons Case* was vital to represent and protect its interest because entry of the consent decree would limit its ability to litigate its case. *Michigan Prisons Case*, 680 F. Supp. 928, 950 (W.D. Mich. 1987). In addition, the *Knop* class stated that its aim was not to challenge the consent decree, but merely to ensure a means of compliance. *Id.*

189. *Michigan Prisons Case*, 680 F. Supp. 928, 950 (W.D. Mich. 1987). The district court's denials of the motions to intervene were not appealed. *Michigan Prisons Case*, 940 F.2d at 147.

190. *See Michigan Prisons Case*, 116 F.R.D. 655, 657 (W.D. Mich. 1987) (stating ¶ O of consent decree conferred amicus curiae on *Knop* and *Hadix* classes). Paragraph O provided:

> The parties by agreeing to this Decree do not intend to create any rights or obligations enforceable by inmates. It is nonetheless recognized that, for purposes of entry of this Decree, the court has granted limited intervention to the plaintiffs in the pending action of *Hadix v. Johnson et al.*, Civ. No. 80-73581, E.D. Michigan (the "Hadix plaintiffs"), and the plaintiffs in the pending case of *Knop v. Johnson et al.*, Civ. No. 84-651, W.D. Michigan (the "Knop plaintiffs"), to participate as *amicus curiae*. To the extent Defendants are required by paragraphs I, J, K and L of this Decree to furnish reports, plans, pleadings, memoranda or other documentation to the Court and the United States, an informational copy shall be provided at the same time to the *amicus curiae*. Any responses of the United States[] shall be similarly circulated. Within 20 days after receipt of said reports, plans, pleadings, memoranda or other documentation, *Hadix* and *Knop* plaintiffs may respond to the Court and parties as *amicus curiae*. Further, *Hadix* and *Knop* plaintiffs have a limited right, at the Court's discretion, to participate as *amicus curiae* at any hearing which may be called.

*Id.* at 657 n.1.

191. Although each power individually granted under ¶ O had previously been permitted by courts, when considered as a whole the *Michigan Prisons Case* amici curiae possessed unprecedented power. *See, e.g.*, Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981) (requiring exceptional circumstances prior to allowing amicus to introduce additional evidence on appeal), *cert. denied*, 456 U.S. 905 (1982); Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (stating privilege of being heard rests in court's discretion); Alabama *ex rel.* Baxley v. Johnson, 300 So. 2d 106, 108-09 (Ala. 1974) (indicating amicus curiae is permitted to introduce evidence under court's discretion).

192. *See Michigan Prisons Case*, 680 F. Supp. 928, 984-86 (W.D. Mich. 1987) (Mar. 27, 1986 bench opinion of Enslen, J.) (reaffirming ability of amicus to present witnesses).

193. *See supra* note 190 (enabling amici, under ¶ O of consent decree, to participate "*at any hearing* which may be called").

194. *See Michigan Prisons Case*, 680 F. Supp. at 959 (Aug. 21, 1985 bench opinion of Enslen, J.) (indicating amici's past briefs were proper in that they assisted court in comprehending issues).

of power, the *Knop* amicus was not content with its status and sought to modify the consent decree.[195] The *Knop* class, through the NPP, sought to have its status upgraded to either intervening party or "litigating amicus."[196]

After three years of litigation, the *Knop* class finally achieved litigating amicus status.[197] Although both parties objected to the grant of litigating amicus status to the *Knop* class, the court found it to be within its inherent authority or discretion to appoint persons to appear as litigating amicus curiae.[198] In doing so, the court conditioned the status on the *Knop* class' agreement to withdraw its other action and rely on the consent decree as its sole remedy for the remaining issues in the lawsuit.[199]

Ultimately, the *Knop* class possessed litigation status that resembled a party more than a conventional amicus curiae. The *Knop* litigating amicus could file motions, present evidence at compliance hearings, comment on compliance matters, conduct discovery, and, most important of all, seek enforcement of the consent decree on its

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195. *See id.* (rejecting *Knop*'s asserted ability to modify consent decree by motion). It is also significant to note that, at that time, the court specifically found that the *Knop* amicus did not have standing as a party and, therefore, could not seek to modify the decree. *Id.*

196. *Michigan Prisons Case*, 116 F.R.D. 655, 657 (W.D. Mich. 1987) (stating *Knop* class first sought litigating amicus status in March 1986).

197. *Id.* at 665. In reaching its decision to allow the *Knop* class to intervene as litigating amicus curiae, the court considered four factors:

(1) judicial economy;
(2) protection of third parties not before the court;
(3) the public's interest concerning the nature of the rights of prisoners;
(4) protection of the interests of the original parties to the suit.

*Id.* at 662-63. Using these four factors, the court held that the presumption was struck in favor of empowering *Knop* as litigating amicus curiae. *Id.* at 663. First, the court found that granting of the litigating amicus status to the *Knop* class enhanced judicial economy. *Id.* at 662. With one step, the court was able to consolidate two actions and establish a private means of supervising a case which placed great demands on judicial time. *Id.* Next, the court found that if the *Knop* class acted as litigating amicus, it could enhance the representation of the prisoners and the public's interest in protecting the rights of citizens. *Id.* at 662-63. Finally, the court concluded that the rights of the parties would not be unduly prejudiced. *Id.* at 663-64. The *Knop* class, acting as litigating amicus, sought to achieve the same goal as the United States: to protect the constitutional rights of prisoners. *Id.* at 663. The court also found the interests of the State of Michigan, the defendant, likewise would not be unduly affected. *Id.* at 664. The defendant's substantive obligations to comply with federal law would not change, while the defendant's financial obligations would be lessened due to the consolidation of the two lawsuits. *Id.*

Judge Enslen was not the first to suggest using an intervention-type analysis prior to empowering an amicus with powers beyond its traditional role. *See* Beckwith & Soberheim, *supra* note 24, at 58-62 (arguing enlargement of traditional amicus powers should be allowed to protect public interest). As early as 1948, commentators urged that amici should be permitted to participate in oral argument, supplement pleadings, and move for dismissal or rehearing, based on some derived standard similar to Rule 24. *Id.* at 60. After 40 years, these commentators' recommendations had been realized.

198. *Michigan Prisons Case*, 116 F.R.D. at 660.

199. *Id.*

own volition.[200] In fact, while limited in its ability to collect attorney's fees under the Civil Rights of Institutionalized Persons Act (CRIPA), the *Knop* amicus' powers surpassed those of a party.[201] First, unlike a party to the action, res judicata would not bar the *Knop* class from pursuing presently existing claims in other tribunals.[202] Additionally, the court relaxed the rules of discovery for the *Knop* class.[203]

### 2. *The litigating amicus and the Sixth Circuit*

The district court's questionable use of the amicus curiae device in the *Michigan Prisons Case* proved difficult for the Sixth Circuit to resolve. In fact, the Sixth Circuit required two chances before deciding the legitimacy of the litigating amicus. This confusion is understandable due to the wide variety of ways courts have used the amicus curiae and the high level of judicial discretion associated with it.

#### *a. The Sixth Circuit: round one*

The district court allowed the *Knop* class, in its capacity as litigating amicus, to exercise a fair degree of influence in the litigation. Ultimately, the State of Michigan sought appeal in the Sixth Circuit[204] and challenged the district court's grant of litigating amicus

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200. *Id.*; *see Michigan Prisons Case*, 940 F.2d at 147 (chronicling litigating amicus powers of *Knop* class). The district court's logic seems flawed in this aspect. If the court found at an earlier point that the *Knop* class lacked "standing or authority to bring motion to alter the state plan," *supra* note 190, how could the passage of one year, all things being equal, cure this lack of standing such that the court was now willing to allow alteration of the state's plan?

201. *Michigan Prisons Case*, 116 F.R.D. 655, 664 (W.D. Mich. 1987).

202. *Id.* Under the district court's ruling, *Knop* was only bound to the consent decree in a limited manner. *Id.* The *Knop* class could still seek redress against the State for a limited number of issues. *Id.* Under normal principles of res judicata, namely claim preclusion, the party would be precluded from later bringing issues which could have been settled in the previous action. Mathews v. New York Racing Ass'n, 193 F. Supp. 293, 294 (S.D.N.Y. 1961) (defining claim as group of facts relating to single occurrence or transaction and finding that plaintiff is not permitted to split claim into multiplicity of suits).

203. *See Michigan Prisons Case*, 680 F. Supp. 928, 984-88 (W.D. Mich. 1987) (Mar. 27, 1986 bench opinion of Enslen, J.) (relaxing discovery procedures). The court allowed the *Knop* amicus to introduce witnesses concerning two aspects of the consent decree: mental health and sanitation. *Id.* at 985. Although the ability to present evidence and engage in oral advocacy is in itself rare, the court went one step further and ruled that the parties to the action were not prejudiced by lack of an opportunity to depose the proposed witnesses. *Id.*; *see* FED. R. CIV. P. 26 (a), (b)(1) (granting parties ability to depose witnesses relevant to subject matter involved in pending action). This decision was questionable. Although the court rationalized its decision on the role of the amicus as information provider, the nature of the amicus curiae was not considered. Clearly, even at this stage, the *Knop* amicus had partisan aims. To face the realities of the situation, the court could have imposed the same rules governing the real parties to the action on the *Knop* amicus. *See* FED. R. CIV. P. 26(a) (permitting deposition); FED. R. CIV. P. 26(b)(4)(A)(i)-(ii) (allowing parties to seek interrogatories of expert witnesses, or other means of discovery with court approval).

204. *See Michigan Prisons Case*, No. 88-7896, 1990 WL 46637, at *1 (6th Cir. Apr. 20, 1990)

status.[205] Rather than reaching the merits, however, the Sixth Circuit ruled that the order granting the status was not final and thus nonappealable.[206] One member of the panel, Judge Krupansky, dissented and questioned the validity of the amicus curiae device.[207]

*b. The Sixth Circuit: round two*

After the first appeal to the Sixth Circuit, the *Knop* amicus began to exercise its unreviewed judicially granted powers. The *Knop* class sought numerous internal reports and prison records through discovery, sought attorneys fees, and instituted contempt proceedings against the State of Michigan.[208] The district court permitted its litigating amicus to pursue these paths and held the State in contempt for its resistance to the requests of the *Knop* amicus.[209]

Almost one year after the Sixth Circuit's first opportunity to review the litigating amicus device, Michigan appealed various modifi-

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(unpublished opinion) (appealing district court's grant of litigating amicus status; appeal dismissed for lack of jurisdiction), *opinion withdrawn*, 901 F.2d 503 (6th Cir. 1990). Although both the United States and the State of Michigan appealed the lower court decision, the United States later withdrew its appeal. *Id.*

205. *Id.* Interestingly, the State argued only that the use of a litigating amicus was improper for *this* type of case. *See* Brief for Appellants at 16-21, United States v. Michigan, No. 88-1869, 1990 WL 46637 [hereinafter Brief for Appellants] (arguing that litigating amicus is sometimes appropriate).

206. *Michigan Prisons Case*, No. 88-1869, 1990 WL 46637, at *1.

207. *Id.* at *5-10 (Krupansky, J., dissenting). In a strongly worded dissent, Judge Krupansky called into question the wisdom of not reviewing the issue of the litigating amicus. *Id.* at *7-9. Judge Krupansky indicated that prior to rendering a decision, the litigating amicus would have to be confronted. *Id.* He indicated that in glossing over this initial question, the majority ignored the historical role of the amicus device and the confusion that could result from the continued existence of this legal fiction. *Id.* at *8-10. Judge Krupansky feared that the litigating amicus device blurred the traditional bright line between an amicus and a real party in interest and stood to open a door to a new method of conferring real party status outside traditional concepts of standing and the Federal Rules of Civil Procedure. *Id.*

After the Sixth Circuit appeal, the *Michigan* litigation continued with the *Knop* litigating amicus retaining its position of control over the litigation. *See Michigan Prisons Case*, 940 F.2d 143, 164 (6th Cir. 1991) (describing Michigan's appeal of district court's holding State in contempt due to failure to cooperate with litigating amicus because of amicus' expanded role and asserting that *Knop* amicus has "virtually assumed effective control of proceedings in derogation of the original parties"); *Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 12284, at *1 (W.D. Mich. Sept. 13, 1990) (granting motion of *Knop* amicus to recover costs associated with first appeal to Sixth Circuit); *Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 7174, at *1 (W.D. Mich. June 12, 1990) (concerning motion by amicus to reject Michigan's proposed prison population plan); *Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 13102, at *1 (W.D. Mich. Oct. 2, 1990) (involving defendant's motion for approval to pursue adjunctive psychiatric inpatient services and amicus' proposal of plan modification); *Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 13103, at *1 (W.D. Mich. Oct. 2, 1990) (stating that *Knop* amicus was opposing motions from both United States and Michigan).

208. *Michigan Prisons Case*, 940 F.2d at 166 (refusing to compel disclosure of internal prison documents under district court's order); *Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 12284, at *1 (W.D. Mich. Sept. 13, 1990) (granting motion by *Knop* to recover costs associated with first appeal).

209. *Michigan Prisons Case*, 940 F.2d at 143-45, 166.

cations of the consent decree.[210] This time, however, the litigating amicus did not slip through the cracks of appellate jurisdiction.[211]

Judge Krupansky wrote the Sixth Circuit's second opinion and dealt squarely with the *Knop* amicus. Judge Krupansky found that the district court's intended role for the *Knop* amicus was to participate in district court proceedings primarily through brief and oral argument as a traditional amicus curiae.[212] The Sixth Circuit recognized that the granting of litigating status to the *Knop* amicus substantially enlarged this traditional role so that the *Knop* class possessed "full litigating rights of a named party."[213] These rights included the ability to file pleadings, conduct discovery, present and compel the attendance of witnesses, introduce evidence at hearings, and issue and enforce subpoenas.[214] Most importantly, the *Knop* amicus possessed powers that private amici never before possessed, such as the ability to move for the modification and amendment of the consent decree and compliance plans, and the ability to initiate contempt proceedings to enforce these privileges.[215]

Judge Krupansky once again lambasted the district court's use of the amicus device in contravention of the litigants' rights and the Federal Rules of Civil Procedure.[216] According to Judge Krupansky, the district court transcended the permissible bounds of the amicus curiae by elevating the amicus to party status.[217] Describing the *Knop* amicus as an "elusive apparition," the Sixth Circuit sought to identify its true nature.[218] The court stated that under the traditional view, the amicus curiae occupied the role of an impartial assistant to the court and not an advisor.[219] The court recognized the trend of courts moving away from the traditional view and toward a limited adversarial role.[220] The court noted, however, that the role under this trend has been participation only through brief and oral

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210. *Id.* at 144-45, 150.
211. *See id.* at 166 (rejecting status of litigating amicus).
212. *Id.*
213. *Id.* at 162-64.
214. *Id.*
215. *Id.*
216. *Id.* at 164-66.
217. *Id.* at 165.
218. *Id.* at 164. Judge Krupansky's definition of an amicus curiae was, however, as narrow as the *Knop* amicus was broad. Judge Krupansky ignored previous lines of authority that defined the contemporary amicus curiae, and adopted a definition more appropriate for the traditional Anglo-American common law amicus. For instance, the Sixth Circuit opinion failed to cite authority allowing the amicus to have an interest in the subject matter of the litigation. *See supra* notes 33-36 and accompanying text (indicating that amici were able to represent their own interests as early as 1700s).
219. *Michigan Prisons Case*, 940 F.2d at 164-65.
220. *Id.* at 165.

argument.[221] Despite these changes, the Sixth Circuit asserted that the amicus has "never been recognized, elevated to, or accorded the full litigating status of a named party or real party in interest, and amic[i] [have] been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise . . . assuming control of the controversy in a totally adversarial fashion."[222]

In so stating, the Sixth Circuit found that the *Knop* amicus violated the historic bright line distinction between the amicus curiae and real-party status and held that proper standing to litigate as a party may only be conveyed under the Federal Rules.[223] The Sixth Circuit found that the district court abrogated the spirit of the Civil Rules of Procedure by granting, in effect, full-party status to the amici without satisfying the conditions set out under the Federal Rules.[224] Thus, the *Michigan Prisons Case* litigation made it clear that amicus curiae device cannot be used as a common law means of bestowing full-party status on private persons. As a practical matter, the Sixth Circuit's opinion established the outer limits of permissible amicus curiae activity.[225]

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221. *Id.*

222. *Id.* at 165 (citations omitted).

223. *Id.*

224. *Id.* at 165-66; *see* WRIGHT ET AL., *supra* note 3, §§ 1901-1902, at 228-32 (describing basic aspects of intervention under Federal Rules). Rule 24 of the Federal Rules of Civil Procedure governs third-party intervention under the federal system. FED. R. CIV. P. 24. Rule 24 allows for two forms of intervention:

> (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication or prejudice the rights of the original parties.

FED. R. CIV. P. 24(a)-(b).

225. *See Michigan Prisons Case*, 940 F.2d at 166 (rejecting district court's grant of authority to litigating amicus curiae which conferred litigating rights equal to real-party-in-interest). The Sixth Circuit did not expressly define the proper scope of activity that an amicus could engage in at the district court level. *Id.* The Sixth Circuit, however, vehemently opposed the district court's bestowing of litigation rights equivalent to a full-party to a suit. The Sixth Circuit reasoned that the district court's "litigating amicus" abrogated Federal Rule of Civil Procedure 24(a) and risked turning the district court into a "free-wheeling forum of competing special interest groups." *Id.* at 165-66. The Sixth Circuit allowed the amici in the suit to continue to act in the traditional manner but did not state what the extent of the "traditional role" should be. Thus, the Sixth Circuit did establish a boundary between real-parties-in-interest and amici curiae. When an amicus crosses this line, its actions are an invalid extension of the traditional concept of amicus activity. *Id.* at 166.

## III. WARNING SIGNS FROM AMICUS USE IN THE *MICHIGAN PRISONS CASE*

The *Michigan Prisons Case* litigation epitomizes the potential chaos that unabetted use of the amicus curiae device can cause within our judicial system. The *Michigan Prisons Case* litigation also proves that protracted confusion over the proper limits and role of the amicus curiae can occur; remember, there was an eight-year period in which the Sixth Circuit did not itself correct the problems it eventually perceived. The *Michigan Prisons Case* litigation should set off alarms within chambers of federal judges throughout the country.

The litigating amicus device, as used by the district court in the *Michigan Prisons Case*, illustrates the current precarious state of amicus curiae in civil litigation. The most obvious confusion appears to be the merging of the governmental and private amicus. For example, the U.S. executive branch, as amicus curiae, has wielded party-like power in upholding the orders of federal courts and vindicating constitutional rights of private individuals.[226] The private litigating amicus device diverges from this past history. For the first time, through the litigating amicus device, the courts have placed near-party power in the hands of a nongovernmental group to assert the constitutional rights of private citizens.[227] At the very least, the *Michigan Prisons Case* litigation and related cases have set a precedent to grant expanded powers to amici curiae in the future. This seems disturbing because, unlike a governmental party, private parties may have their own agenda, unattached to broad policy goals normally coupled with governmental amici.

There are two other evils of the litigating amicus that are more disconcerting than the merging of these two classes of trial participants, however. First, the litigating amicus device may serve as a

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226. *Cf.* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (ruling district court did not abuse its discretion by allowing U.S. Government, as amicus curiae, to exercise party-like powers to protect rights of prisoners because no prejudice resulted); *In re* Estelle, 516 F.2d 480, 483-85 (5th Cir. 1975) (denying writ of mandamus against district court for giving permission to U.S. Government as amicus and intervenor to engage in discovery in order to protect rights of state prisoners because district court's order was not final); DeVonish v. Garza, 510 F. Supp. 658, 659-60 (W.D. Tex. 1981) (citing Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946) and denying motion to exclude U.S. Department of Justice as litigating amicus, on grounds that court is always free to call on law officers of United States to serve as amici, especially to protect honor of court); Wyatt v. Stickney, 344 F. Supp. 373, 375 (M.D. Ala. 1972) (stating that district court allowed United States as amicus curiae to present suggested standards for prison conditions in prisoner's rights case), *aff'd in part, rev'd in part sub nom.* Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974); *see supra* notes 107-14 (describing governmental amici with party-like powers).

227. *See* Brief for Appellants, *supra* note 205, at 18-19 (inferring that only proper use of litigating amicus is as tool of government). *But see* Brief for Appellee, *supra* note 12, at 37-38 (rejecting governmental-private amici distinction).

means for certain litigants to circumvent Article III's standing requirements. Additionally, if left unchecked, the litigating amicus device may frustrate Rule 24's intervention provisions.

### *A. The Litigating Amicus in Light of Article III*

The Article III standing requirement is a critical threshold that all those wishing to have their interests adjudicated within the federal judiciary must meet.[228] If courts or litigants could mold the litigating amicus curiae into a vessel enabling third parties, lacking the requisite standing, to enter into federal courts and directly participate in a given litigation, the effects could be far reaching.[229] The litigating amicus would thus become the mystical gateway to the federal judicial system that countless public interest attorneys have pursued.[230]

To maintain the cornerstone of our judicial system, courts must diligently protect standing requirements. The amicus device is a proper judicial tool only when it provides access to persons who meet the requirements of Article III, but are precluded by operation of another rule.[231] The amicus status should not serve as an alternative to Article III. For example, all private litigating amici prior to the *Michigan Prisons Case* stopped short of possessing full litigating powers.[232] The litigating amicus in the *Michigan Prisons Case* went beyond this point.

There is serious question whether the *Knop* class or the NPP were properly categorized as litigating amicus to the *Michigan Prisons Case* action.[233] Throughout the litigation, the *Knop* class appeared to be

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228. *See supra* notes 48-50 and accompanying text (discussing standing requirement encompassed under Article III).

229. *See* L. Gordan Crovitz, *Revived 'Standing' Can Make Political Plaintiffs Stand Down*, WALL ST. J., Apr. 18, 1990, at A23 (indicating that rigid standing rules would endanger jobs of "the legions of 'public-interest' lawyers" that seek to evade standing requirements).

230. *Id.*

231. *See* EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 928 (N.D. Cal. 1987) (denying pilots' motion to intervene because, under statute, pilots' legal right to sue ended after EEOC involvement began, yet permitting pilots to act as hybrid-amicus curiae). The court in *EEOC v. Boeing Co.* stated:

> Even though the motion is timely, the pilots do not have an interest in this case sufficient to create a right to intervene. The pilots, of course, have an interest in the outcome of the lawsuit. Their futures are clearly affected by this suit in a vital way. However, "interest," as used in Rule 24(a), is interpreted by the court to mean legal interest. . . .

EEOC v. Boeing Co., 109 F.R.D. 619 (W.D. Wash. 1985). The court held that the pilots lacked such a legal interest. *Id.*

232. *See supra* notes 157, 172 and accompanying text (stating that *Boeing* line of cases and *Michigan Fishing Rights Case* avoided vesting amicus curiae with ability to control litigation).

233. *See Michigan Prisons Case*, 940 F.2d 143, 164 (6th Cir. 1991) (describing activity of NPP and recognizing that NPP acted "through [a] structured willing surrogate"—the *Knop* litigating amicus).

a proverbial strawman; a fictional facade used to achieve what the real player, the NPP, was incapable of attaining.[234] In the case of the NPP/*Knop* litigating amicus, this impermissible goal was, for all practical purposes, participation in a suit as a party devoid of a personal stake in the litigation.[235] As the Sixth Circuit suggested, if the litigating amicus was left unabated it potentially could have evolved into a middle tier class of litigation participants within the federal judicial system.[236]

### *B. The Amicus and the Federal Rules of Civil Procedure*

Widespread judicial use and acceptance of the litigating amicus device would probably create a "common law" mode of third-party intervention, separate and distinct from the Federal Rules of Civil

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234. WASBY, *supra* note 1, at 111 (suggesting early public interest group involvement at trial court level provides means of bypassing standing requirement); Koch, *supra* note 5, at 158 (describing nonparty tactic of gaining control of plaintiff, as counsel, in order to elude party standing requirements).

235. *See* Koch, *supra* note 5, at 155-58 (describing means of third-party intervention in Canada). Wasby places the problem in the proper perspective. He explains that one potential way for an interest group to surpass the standing requirement or limited nature of amicus intervention is

> to become involved in a case at its earliest stages of litigation, prior to trial, and to have control of the case as counsel of one of the parties. As counsel, a public interest group will have standing at trial to adduce evidence and to cross-examine the witnesses of the other side. . . . Furthermore, through its "client," the public interest group will itself be able to launch an appeal in the event of an unfavourable judgment and will have automatic respondent status in the event of an appeal of a favourable judgment.

*Id.* at 158 (footnote omitted). Such an approach is not without danger. If a court detects that the real party is being used as a strawman to confer standing, the interest group, may lose its party camouflage. *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (reasoning that role of amicus was proper and did not cross party threshold since amicus was not controlling litigation or using prisoners as strawman to litigate its own views).

236. *Michigan Prisons Case*, 940 F.2d at 166; *see Michigan Prisons Case*, 680 F. Supp. 928, 984-88 (W.D. Mich. 1987) (Mar. 27, 1986 bench opinion of Enslen, J.) (discussing differences in abilities between standard and litigating amici and assuming litigating amicus is valid entity). Traditionally, there has been a bright line between party and amicus curiae participants. *Michigan Prisons Case*, 940 F.2d 143, 165 (6th Cir. 1991). This traditional distinction was generally a function of the standing requirement. *See* Beckwith & Sobernheim, *supra* note 24, at 59 (asserting that because amicus is not party to suit, amicus curiae's powers and rights should not be compared to party's powers and rights). If an amicus is allowed to cross this dividing line, a fairly strong class of litigant may emerge. This new middle ground would allow a nonparty without standing to gain unprecedented control over the dynamics of the litigation. This nonparty would be able to influence the nature and size of the litigation through use of discovery, Rule 11 proceedings, and contempt and enforcement hearings, without the clear res judicata limitation placed on most parties. A litigating amicus without standing thus comes very close to breaching the injury-in-fact limitation underlying Article III's case or controversy clause, as well as prudential considerations weighing against the assertion of third-party rights. TRIBE, *supra* note 47, § 13-16, at 114; *see supra* note 47 (discussing prudential/nonconstitutional aspects of standing). Simply put, if the party lacks the requisite concrete interest, the dispute is reduced to a mere forum where public grievances are aired and debated. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473 (1982) (discussing pragmatic concerns underlying Article III standing).

Procedure. Assuming a litigating amicus satisfies the strictures of Article III,[237] this amicus derivation should be assessed from another perspective: its affect on third-party practice. By accepting the litigating amicus, the *Michigan Prisons Case* court added, de facto, a new method of involving a third party in on-going litigation.[238]

At present, the Federal Rules of Civil Procedure provide several formal methods by which outside interests can be represented in the course of litigation.[239] The Federal Rules of Civil Procedure incorporate devices allowing for class actions,[240] compulsory joinder,[241] and intervention[242] to address the shortcomings of the adversarial process.[243] In addition to these formal methods, courts have allowed the use of the amicus curiae as an informal means of representing outside interests.[244] The distinction between these formal and informal methods has been the degree and nature of the third-party representative's participation.[245] Formal methods, provided for in the Federal Rules of Civil Procedure, bestow full-party status to the newcomer.[246] The informal method of amicus representation, however, traditionally allows the third party to play only the limited role of an advisor or information provider.[247] Because the

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237. *See supra* notes 53-62 and accompanying text (discussing requirements of diversity of citizenship and standing for cases to be heard in federal forum).

238. *See Michigan Prisons Case*, 940 F.2d at 164-66 (outlining traditional role of amicus curiae and attacking trial court's creation of "this legal mutant" that bestows status and rights of named party/real party in interest to third parties unable to obtain full litigating rights through formal methods). The amicus device appears to have come full circle. During the 18th and 19th centuries, when strict adherence to the adversary trial process and its rules prohibited third-party intervention, the courts utilized the amicus device to inject a third-party voice into the litigation. *See supra* notes 30-36 and accompanying text (explaining how amicus curiae was used to overcome aspects of common law adversarial system of adjudication that ignored third-party interests). Today, the litigating amicus, far removed from its common law cousin, expands the opportunity for third-party involvement in the present system. *See Michigan Prisons Case*, 940 F.2d at 163-64 (arguing litigating amicus bypasses "all conventional laws and judicial rules of civil practice and procedure," including Federal Rules 14 and 17-25).

239. *See* WRIGHT ET AL., *supra* note 3, § 1901, at 228-29 (presenting formal methods for intervention under Federal Rules of Civil Procedure).

240. FED. R. CIV. P. 23.

241. FED. R. CIV. P. 19.

242. FED. R. CIV. P. 24; *see supra* note 224 (quoting provisions of Rule 24).

243. *See* WRIGHT ET AL., *supra* note 3, § 1901, at 228 (positing that devices in Federal Rules of Civil Procedure were result of recognition that private litigation affects interests of those not named as parties).

244. *See supra* notes 30-36 and accompanying text (describing evolution of amicus curiae as means of providing third-party representation).

245. *See* Covey, *supra* note 4, at 31-32 (distinguishing nature and extent of involvement between amicus curiae and intervenor).

246. *See* WRIGHT ET AL., *supra* note 3, § 1901, at 228 (outlining three formal methods of compulsory joinder, class actions, and intervention); Covey, *supra* note 4, at 31-32 (stating that, like named parties, intervenors are bound by resulting judgment and must have some direct interest in outcome of litigation).

247. *See* Miller-Wohl Co. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982) (indicating that traditional role of amicus curiae is to assist in case of general public

amicus lacks power to direct the course of the litigation, the amicus can only respond as the parties choose to develop the litigation.[248]

Frequently, the amicus curiae has been closely related to formal third-party practice under the Federal Rules of Civil Procedure. In fact, courts have commonly granted amicus status to groups failing to meet the formal requirements of intervention.[249] While the degree of involvement allowed varied with the equities at stake, before the *Michigan Prisons Case*, courts never granted full litigating privileges to a private amicus. The court's creation of the litigating amicus in the *Michigan Prisons Case* blurred this once bright line between the formal and informal means of third-party litigation participation.[250] The litigating amicus curiae, through discovery powers,[251]

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interest and alert court to law of which it was unaware); Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (stating that historically amicus curiae was seen as aiding in pursuit of justice by acting as impartial interpreter, information giver, and advisor); 4 AM. JUR. 2D *Amicus Curiae* § 1, at 109 (1962) (outlining role of amicus curiae as friend and helper of court in investigating and calling attention to law that court might not have considered).

248. *See In re* Leaf Tobacco Bd. of Trade, 222 U.S. 578, 581 (1911) (indicating that amicus curiae, because of its lack of standing, may not engage in activities affecting future course of litigation, such as appeal); Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973) (asserting amicus may not seek to control litigation by requesting individual relief not requested by parties); 4 AM. JUR. 2D *Amicus Curiae* § 3, at 111 (1962) (asserting amicus curiae may not exercise control over litigation or initiate any proceedings within suit, but must merely accept issues that parties bring to court's attention); George C. Piper, Comment, *Amicus Curiae Participation—At the Court's Discretion*, 55 KY. L.J. 864, 870 (1967) (indicating amicus curiae cannot inject new issues, but must accept its traditional reactive role); *see also supra* notes 96-101 and accompanying text (discussing inability of amicus curiae to control litigation).

249. For examples where courts have recognized amicus curiae status of those who failed to meet requirements of intervention, see Howard v. Illinois Cent. R.R., 207 U.S. 463, 490 (1908); Tenneco, Inc. v. FERC, 688 F.2d 1018, 1020 (5th Cir. 1982); Superior Oil Co. v. Western Slope Gas Co., 604 F.2d 1281, 1285 (10th Cir. 1979); *In re* United Steelworkers of America, 595 F.2d 958, 960 (4th Cir. 1979); Henderson v. International Union of Operating Eng'rs, 420 F.2d 802, 806 n.2 (9th Cir. 1969); Morin v. City of Stuart, 112 F.2d 585, 585 (5th Cir. 1939); United States v. Michigan, 116 F.R.D. 655, 664 (W.D. Mich. 1987); EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 928 (N.D. Cal. 1987); EEOC v. Boeing Co., 109 F.R.D. 6, 10-11 (W.D. Wash. 1985); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 41 (W.D. Mo. 1975), *cert. denied*, 429 U.S. 940 (1976); United States v. IT & T Corp., 349 F. Supp. 22, 27-28 (D. Conn. 1972); Wooton v. Moore, 42 F.R.D. 236, 241-42 (E.D.N.C. 1967); Peterson v. United States, 41 F.R.D. 131, 135 (D. Minn. 1966); United States v. Loew's Inc., 136 F. Supp. 13, 14 (S.D.N.Y. 1955); NLRB v. Swift & Co., 130 F. Supp. 214, 216-17 (E.D. Mo. 1955), *order modified*, 233 F.2d 226 (8th Cir. 1956); Durkin v. Pet Milk Co., 14 F.R.D. 374, 380-81 (W.D. Ark. 1953).

250. *See Michigan Prisons Case*, 940 F.2d 143, 165-66 (6th Cir. 1991) (noting that historically, distinction between amicus curiae and real party in interest was clear, but that "the judicial fiat of litigating amicus in the instant case transcends the traditional concept of that term within accepted jurisprudence" to a case or controversy); United States v. Smith, 686 F. Supp. 847, 853 n.9 (D. Colo. 1988) (stating that one seeking amicus status cannot be party to suit and implying that roles of amicus curiae and party are distinct); *supra* notes 96-101 and accompanying text (revealing ways in which amicus curiae's rights in litigation are more limited than party's).

251. *See Michigan Prisons Case*, 680 F. Supp. 984, 985 (W.D. Mich. 1986) (stating that allowing amicus to present witnesses at hearings did not mean court was granting *Knop* class litigating amicus curiae privileges, which include participation in discovery and filing of motions). The court supported its decision to allow the amicus to call witnesses by citing in-

motion practice, and most importantly through enforcement powers, had the ability to set the course of litigation.[252] For the first time, an amicus could invoke a court's judicial power rather than merely serve a litigant or the court. The litigating amicus as defined by the *Michigan Prisons Case* was no longer confined to a reactive role, but for all practical purposes, became a party to the litigation.[253]

In the *Michigan Prisons Case*, because the litigating amicus injected a new party into an ongoing litigation, this judicial creation bore a striking resemblance to the intervention provisions of the Federal Rules of Civil Procedure.[254] The *Michigan Prisons Case* litigating amicus device assailed federal intervention provisions on both procedural and policy levels.[255] Procedurally, the litigating amicus

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stances in which the U.S. Department of Justice was allowed more than the usual participation of amici. *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (finding no error where district court allowed amicus to participate fully in discovery, trial, and appeal of case). In *Hoptowit*, the court's granting a greater role in litigation to the amicus could be viewed as an approval of the litigating amicus device without applying the label. It is interesting that in the *Michigan Prisons Case*, the court, in reiterating its intention to refuse the *Knop* class litigating amicus status, stated that it merely intended to allow it to participate as the U.S. Department of Justice had in *Hoptowit*. *Michigan Prisons Case*, 680 F. Supp. at 986.

252. *See Michigan Prisons Case*, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (granting *Knop* class amicus ability to seek enforcement of consent decree). As a result of granting litigating amicus status, the court opened the door for the *Knop* amicus to avail itself of the court's enforcement powers for the *Knop* class' own benefit. The *Knop* litigating amicus could seek to have the defendant held in contempt. *See Michigan Prisons Case*, 680 F. Supp. 1055, 1056 (W.D. Mich. 1987) (responding to motions for order of contempt filed by parties and amicus). The litigating amicus could move for the court to reject the defendant's attempts to abide by terms of the decree. *See Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 7174, at *3 (W.D. Mich. June 12, 1990) (considering motion by plaintiff and *Knop* amicus to alter defendant's plan). Additionally, as litigating amicus, the *Knop* class could seek costs associated with appeal. *See Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 12284, at *3 (W.D. Mich. Sept. 13, 1990) (overruling defendant's objections concerning *Knop*'s lack of standing and failure to file a timely claim, and granting amicus' request for costs). These abilities expanded the traditional role of the amicus. The most significant expansion of the three was the ability of the *Knop* amicus to recover costs for appeal. In the past, such recovery was dependent on certain conditions being met and was usually denied where amici volunteered their assistance rather than appeared due to judicial request and appointment. *See* Morales v. Turman, 820 F.2d 728, 731 (5th Cir. 1987) (stating that fees could be awarded if court-appointed amicus provided services that helped resolve case and if party directed to pay was responsible for situation necessitating appointment of amicus, and denying amici's request because they were volunteers to suit); *see also* Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982) (stating same).

The quasi-party status may also enable the amicus to seek sanctions under Rule 11. Previously, an amicus seeking Rule 11 penalties could do so solely for the benefit of the court. *See* Snow Mach., Inc. v. Hedco, Inc., 838 F.2d 718, 726 & n.6 (3d Cir. 1988) (noting that court could appoint amicus to advocate that Rule 11 fines be paid to court rather than opposing party). It is an open question whether a litigating amicus, capable of collecting fees for its own benefit, would be able to independently invoke and collect Rule 11 fees.

253. *See Michigan Prisons Case*, 940 F.2d 143, 164-65 (6th Cir. 1991) (stating that district court's creation of litigating amicus device provided means to acquire status and rights of named party for those who could not meet formal requirements).

254. *Id.*

255. Besides loosening the procedural requirement of Rule 24, the court's use of the litigating amicus also affected the underlying policies of the Rule. Rule 24 embodies a policy of balancing several interrelated and antagonistic interests present in litigation, including the

created a more permissive means of intervention than provided under the Federal Rules; in the *Michigan Prisons Case* those with outside interests obtained litigating amicus status without meeting the requirements of timely intervention[256] and without a showing that the group was a necessary party.[257] By allowing an amicus to play a full litigating role without enforcing the formal requirements, the court in the *Michigan Prisons Case* established a direct conflict between the Federal Rules of Civil Procedure and the common law.

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interests of nonparties in being represented, the interests of parties in achieving both quick and complete relief, and the public interest in achieving judicial economy. *See* Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (quoting Neusse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)) (positing that goal should be to dispose of lawsuits "by involving as many apparently concerned persons as is compatible with efficiency and due process" and that intervention is accommodation between conflicting goals of trying to resolve related issues in single lawsuit and trying lawsuit of fruitless complexity); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824 (5th Cir. 1967) (stating intervention involves balancing private parties' desires to keep control of lawsuit without meddling from others and overcrowded judicial system's need to consolidate suits and parties with same issues); Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1232 (1966) (expounding that Federal Rule 24 considers needs of nonparties, trial convenience, and original parties); John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 330-31 (1969) (outlining interests of initial parties, intervenors, courts, and political entities and noting that all interests must be balanced when intervention is being considered); David C. Capell, Note, *When a Permissive Intervenor Impairs the Plaintiff's Control*, 35 HASTINGS L.J. 707, 709-20 (1984) (arguing courts must find balance between nonparties seeking to intervene and rights and expectations of original parties); Comment, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 531-32 (1968) (indicating antagonistic relationship between parties and nonparties occurring under federal third-party practice). The interrelationship of these factors determines whether a given party will be allowed to intervene into an existing lawsuit under Rule 24. WRIGHT ET AL., *supra* note 3, § 1901, at 230.

In the *Michigan Prisons Case* litigation, the district court considered the same set of interests embodied in Rule 24, but altered the manner in which the factors were utilized. *Michigan Prisons Case*, 116 F.R.D. 655, 663 (W.D. Mich. 1987). Rather than utilizing a three-prong balancing test, the court began with the presumption that the nonparty inmates should be involved in the litigation because of the effect the court's decree would have on them. *Id.* As a result, the original parties had the burden to demonstrate that the grant of litigating status to the inmates would prejudice their interests. *Id.* at 662-63. The *Michigan* litigating amicus device shifted the balance in favor of the newcomer, while minimizing the significance of the original parties' desires.

256. *See* FED. R. CIV. P. 24(a)-(b) (requiring that those seeking intervention of right or permissive intervention must file "timely application"); *Michigan Prisons Case*, 680 F. Supp. 949, 951 (W.D. Mich. 1984) (finding that motions to intervene were untimely under Rule 24 and would impose prejudice to parties if granted). Because the trial court earlier had refused to grant the request of the *Knop* class to intervene because of untimeliness, the court later had to find an alternative means to allow the *Knop* class to participate in litigation and protect its interests. The court in *Michigan* circumvented the timeliness requirement of Rule 24's intervention provision by granting the amicus full litigating status three years after the initiation of the suit. *Michigan Prisons Case*, 116 F.R.D. 655, 662-64 (W.D. Mich. 1987) (upgrading *Knop* class to litigating amicus while denying class' renewal of application to intervene).

257. *See* FED. R. CIV. P. 24(a) (requiring approval of intervention when applicant has interest in subject of action but is unable to protect that interest without intervening). According to the notes of the Advisory Committee on Rules for the 1966 amendments to the Federal Rules of Civil Procedure "an applicant [for intervention under Rule 24] is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i) . . . unless his interest is already adequately represented in the action by existing parties." FED. R. CIV. P. 24 advisory committee's note, 1966 amendment.

By necessity, the Federal Rules must prevail in such cases.[258]

## IV. DESPITE THE WARNING SIGNS, THE PROBLEM REMAINS UNRESOLVED

The district court's use of the litigating amicus curiae in the *Michigan Prisons Case* is significant because the extreme range of powers that the *Knop* amicus possessed.[259] Although the Sixth Circuit re-

258. There are pros and cons to courts creating a common law means of intervention. By altering the manner in which policy concerns of Federal Rule 24 are assessed, courts that use the amicus device as a means for nonparty intervention skew the balance between party interests and nonparty interests. *See supra* notes 255-56 and accompanying text (revealing how process by which litigating amicus was permitted participation skewed balance of interests encompassed under Rule 24's intervention provisions). Parties to the litigation are more apt to lose control of the litigated matters, such as what, when, and how issues are to be presented, due to an increased difficulty in keeping nonparties out of the court. *See Michigan Prisons Case*, 680 F. Supp. 270, 273 (W.D. Mich. 1988) (considering independent motion by *Knop* amicus that was not raised by parties). Additionally, the original parties may experience an increase in the adversarial nature of the proceedings. *See Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 7174, *4-5 (W.D. Mich. June 12, 1990) (responding to motion of *Knop* amicus to reject defendant's prison population plan, highlighting more issues with which plaintiff may challenge defendant). The named parties also can become burdened with additional costs in the present litigation. *See Michigan Prisons Case*, No. G84-63, 1990 U.S. Dist. LEXIS 12284, at *3 (W.D. Mich. Sept. 13, 1990) (ordering defendants to pay costs for *Knop* litigating amicus for Sixth Circuit appeal as if party); *Michigan Prisons Case*, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (reasoning that litigation costs would be less for defendant if *Knop* amicus were granted litigating status due to consolidation of two suits, yet overlooking potential costs of litigation that would likewise be presented to original plaintiff, such as added costs of discovery accompanying additional parties and legal costs of prolonged judicial proceedings).

Despite the potential drawbacks, there are some positive aspects of utilizing the litigating amicus device as a means of third-party intervention. The litigating amicus device provides the court with additional ability to handle changes occurring during the litigation of the matter. *See Michigan Prisons Case*, 116 F.R.D. at 657-68 (discussing how changed nature of litigation prevented *Knop* amicus from adequately protecting its interests). By using the litigating amicus to bypass Rule 24's provisions, courts may avoid the timeliness requirement in cases where the present party no longer adequately represents the intervenor's interests. *See Michigan Prisons Case*, 116 F.R.D. at 658 (expressing concern that plaintiff may not be sufficiently representing interests of *Knop* amicus); EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 928 (N.D. Cal. 1987) (granting litigating amicus status because court doubted effectiveness of EEOC's representation of ex-pilots' interests); EEOC v. Boeing Co., 109 F.R.D. 6, 8, 11 (W.D. Wash. 1985) (allowing amicus to participate in suit because amicus was not satisfied with EEOC's representation of its interests and because court anticipated that participation of amicus would facilitate communication between EEOC and amicus). Instead of allowing a reluctant party to continue representing third-party interests, courts can interject a more appropriate representative into the litigation, despite earlier findings of untimeliness. Although particularly valuable where the intervenor's civil rights may be at issue, courts should not permit parties to use the device short of a showing of dire necessity.

259. *See Michigan Prisons Case*, 940 F.2d 143, 165 (6th Cir. 1991) (stating that never before have courts granted full litigating status on amicus curiae). From a traditional view, the district court's grant of broad litigating rights to the *Knop* amicus appears radical. The vast majority of trial and appellate courts refrain from giving amici curiae anything more than limited roles. *See, e.g.*, EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 929 (N.D. Cal. 1987) (limiting amicus' ability to engage in discovery and refusing to allow amicus to exercise veto over settlement proceedings); EEOC v. Boeing Co., 109 F.R.D. 6, 11 (W.D. Wash. 1985) (refusing amicus ability to engage in discovery); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (stating that amicus serves court and is limited to assuring full presentation of issues and making suggestions to court); Allen v. County Sch. Bd. of Prince Edward County, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961) (positing that amicus is not advocate

fused to grant the amicus full litigating powers, the court gave no indication of what role the amicus *should* play within the federal system.[260]

Even after the Sixth Circuit's final opinion, the confusion that permitted the *Knop* litigating amicus to germinate still remains. The authority that created governmental and private amici is still in effect, and a courts' use of the amicus status is monitored only by a deferential discretionary standard.[261] Clearly, there will always be instances where representation of outside interests is necessary, and judicial resources are only apt to become scarcer. In short, future courts are likely to continue to experiment with the proper bounds of amicus curiae activity.

From a black letter approach of civil procedure and constitutional law, the use of the amicus curiae to create a quasi-party seems alien. When the focus of the analysis is placed on the amicus curiae rather than on the procedural or constitutional aspects, however, the emergence of the litigating amicus seems almost natural. Historically, the amicus functioned as a means of providing judicial flexibility.[262] The amicus curiae provided an informal solution to problems the court encountered due to the nature of the judicial system.[263] The creation of the litigating amicus curiae provided the courts with

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and duty of amicus is to advise court of applicable law); Garland Co. v. Filmer, 1 F. Supp. 8, 9 (N.D. Cal. 1932) (asserting amicus' purpose is merely to enlighten court); Kemp v. Rubin, 64 N.Y.S.2d 510, 512 (Sup. Ct. 1946) (reasoning that granting amicus curiae right to participate in trial and motion hearings and to receive all filings is tantamount to full intervention, and thus, outside court's ability to grant); Klein v. Liss, 43 A.2d 757, 758 (D.C. 1945) (finding that amicus curiae is not party to action and its sole function is to advise and make suggestions to court); *In re* Perry, 148 N.E. 163, 165 (Ind. App. 1925) (finding that amicus is without power to engage in motion practice, submit pleadings, or exercise control over litigation); City of Grand Rapids v. Consumers' Power Co., 185 N.W. 852, 854 (Mich. 1921) (finding that although matters of public interest warrant involvement of amicus curiae, its participation is limited to filing brief; oral argument is not permitted); McClellan v. State (*In re* McClellan's Estate), 129 N.W. 1037, 1042 (S.D. 1911) (asserting that amicus has no ability to institute any proceeding before court); Hamlin v. Perticuler Baptist Meeting House, 69 A. 315, 319 (Me. 1907) (finding that amicus has no ability to assert control over course of litigation); Taft v. Northern Transp. Co., 56 N.H. 414, 416 (1876) (ruling that amicus curiae may not bring motion to dismiss and cannot assume role of counsel for defendants); Martin v. Tapley, 119 Mass. 116, 116 (1875) (ruling that amicus has no control over litigation and may not institute any proceeding within litigation); Piggot v. Kirkpatrick, 31 Ind. 261, 261 (1869) (refusing to consider amicus curiae's motion to dismiss because no motion can be made by one not party to suit).

260. *Michigan Prisons Case*, 940 F.2d 143, 166-67 (6th Cir. 1991) (finding grant of full litigating powers to amicus curiae was improper).

261. *See supra* note 131 and accompanying text (inferring that adaptable nature of amicus curiae device is attributable to vague discretionary rules and long tradition of discretionary standard).

262. *See supra* notes 16-18 and accompanying text (discussing historical evolution of amicus and emphasizing how judicial flexibility was afforded).

263. *See supra* notes 16-18 and accompanying text (revealing how presence of amicus curiae allowed courts to circumvent limitations of adversary system by injecting another voice into suit).

a means of representing third-party interests that otherwise would be neglected under the Federal Rules of Civil Procedure and the U.S. Constitution.[264]

The significance of the litigating amicus curiae in this capacity cannot be understated. Commentators recognize that the litigating amicus can be used to address wide-scale social problems for which the adversarial system has failed to provide a structure for creating appropriate remedies.[265] Where social issues confront federal courts, broad participation by all relevant actors not only increases the likelihood of successful resolution, but also promotes a higher degree of acceptance and commitment to the remedy.[266] The litigating amicus provides one vehicle for assuring these benefits.

In addition to the court's enhanced ability to protect third-party interests, the main benefit of the amicus device is the conservation of scarce judicial resources.[267] By granting litigating amicus status to a nonparty, a court may be able to expend less of its own time and resources by effectively appointing the interested amicus as supervisor of its orders.[268] This supervisory role of the litigating amicus is especially useful in cases requiring vast amounts of court supervision.[269] Additionally, a court may be able to consolidate similar law-

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264. *See supra* notes 46-55 and accompanying text (explaining how constitutional requirements of standing and diversity limit group of interested parties who can litigate in federal courts); *supra* notes 238, 253-54, 256-57 and accompanying text (stating that litigating amicus device allows those who cannot meet formal requirements of intervention to enter litigation and participate fully as named party).

265. *See* HOROWITZ, *supra* note 85, at 49 (arguing that courts tend to ignore social policy issues when they threaten traditional means of judicial resolution); McGovern, *supra* note 167, at 463 (indicating litigating amicus device ensures involvement of all key decisionmakers in settlement process); Sturm, *supra* note 85, at 1373-74 (indicating value of litigating amicus in developing consensual remedies in public law litigation); Sturm, *supra* note 85, at 1367-74 (positing that courts fail to properly account for public interest or wide policy implications in traditional models of adjudication and recognizing value of litigating amicus in developing consensual remedies in public law litigation).

266. *See* Sturm, *supra* note 85, at 1392-95 (explaining benefits of participation of interested parties at remedial stage of litigation and arguing that adversary model is not designed to promote such participation).

267. *See Michigan Prisons Case*, 116 F.R.D. 655, 662 (W.D. Mich. 1987) (revealing that court's concern with case load and amount of judicial resources being spent on case was one factor in granting status to *Knop* class). In fact, from the outset of the *Michigan* litigation, the district court expressed its frustration over the assignment of the case, knowing how much time the case would consume. *Michigan Prisons Case*, 116 F.R.D. 655, 662 (W.D. Mich. 1987) (Enslen, J.) ("I don't know a federal judge in the country that wants a massive prison suit dumped on him or her.").

268. *See Michigan Prisons Case*, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (granting litigating amicus ability to enforce consent decree). By granting enforcement powers and party-like powers to the *Knop* class, the court obtained a free mode of supervision.

269. *See id.* at 662 (indicating that judicial economy results from appointing *Knop* litigating amicus). Prisoners' rights cases fall squarely within the realm of cases demanding a great deal of judicial time. *See Michigan Prisons Case*, 680 F. Supp. 944, 944 (W.D. Mich. 1984) (expressing court's desire to avoid prison suits because of their tendency to be time-consuming). Indeed, this may explain why most cases involving litigating amici, or amici with enhanced

suits by awarding litigating amicus status to a group.[270]

## V. RECOMMENDATIONS CONCERNING THE LITIGATING AMICUS

Today, as litigation in civil rights, prisoners' rights, abortion, and other areas of social policy proliferates, and as courts become overwhelmed by the quantity and complexity of litigation, amicus curiae activity is bound to increase. Those formally shut out of the judicial politicking will seek a means by which to inject their voices into the arena. In addition, large complex cases will require courts to seek outside assistance. The amicus curiae is a tool capable of meeting both of these needs.

Controversy remains, however, concerning the proper role of the amicus curiae at the federal district court level. This confusion led to the line of cases developing the litigating amicus, an entity that lies somewhere between a real party in interest and the conventional amicus curiae. The *Michigan Prisons Case* litigation illustrates how amicus curiae status can be carried to extremes. The history of the amicus curiae, as well as the nature of the federal system, suggest that the Sixth Circuit's denunciation of the litigating amicus did not end the controversy, but merely slowed the amicus' evolution.

The factors that allowed the *Michigan Prisons Case* litigating amicus to emerge are still present and at work. The vague discretionary standard remains, allowing courts to use the amicus curiae device as a flexible and adaptable means to achieve desired ends. Additionally, several fertile lines of cases exist that blur intervention and amicus activity,[271] highlight the equitable nature of the amicus,[272] and

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powers, occur within prisoners' rights cases. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (affirming district court's appointment of U.S. Department of Justice and U.S. attorney as amici to act on behalf of Washington prisoners and participate fully in discovery, trial, and appeal of case); *In re* Estelle, 516 F.2d 480, 482-83, 487 & n.5 (5th Cir. 1975) (rejecting writ of mandamus requested to prevent amicus curiae from participating and assisting court in prisoners' suit), *cert. denied*, 426 U.S. 873 (1976); DeVonish v. Garza, 510 F. Supp. 658, 658-59 (W.D. Tex. 1981) (denying defendant's motion to dismiss United States as litigating amicus in Texan prisoners' rights suit). The other major category of cases that tend to invoke amici concerns school desegregation. *See* Faubus v. United States, 254 F.2d 797, 804-05 (8th Cir. 1958) (addressing propriety of district court's invitation to Attorney General and U.S. attorney to appear as amici and of amici's authority to submit pleadings, evidence, arguments, and briefs and to file for injunctive relief in school desegregation case); Aaron v. Cooper, 163 F. Supp. 13, 16 (E.D. Ark. 1958) (seeking to enforce school desegregation order with aid of United States as amicus curiae).

270. *See Michigan Prisons Case*, 116 F.R.D. at 657, 664 (conditioning grant of litigating amicus status on *Knop* class' discontinuation of another suit against state of Michigan).

271. *See supra* notes 76-78, 250 and accompanying text (providing examples of cases that allowed amici to play greater role in litigation, blurring once distinct line between amicus activity and party intervention).

272. *See supra* notes 161-65 and accompanying text (positing that district courts used their equity powers to create hybrid amicus to represent interest of those excluded under formal means of intervention).

promote and allow the creation of governmental and private litigating amici curiae.[273] The stage is set, and the key players are in place; all that is needed is the script—a new cumbersome public law litigation.

### *A. Two Possible Avenues of Addressing the Question of Federal District Court Amicus Activity*

The amicus curiae device is a creature of common law. As a result, decisionmakers may address the difficulties engendered by the use of the amicus device on two levels: common law precedent or legislative enactment. Both alternatives create opportunities to prevent further confusion and to promote consistency within the federal courts. Given the confusing common law history, promulgation of a new Federal Rule of Civil Procedure may be the most effective way of both preserving the amicus curiae's usefulness while enhancing its acceptability.

#### *1. A common law solution to a common law problem*

The most obvious solution, and yet most difficult to attain, is for courts to create new precedent that delineates the proper role of the amicus curiae. Although courts could control the creation and activities of amici curiae, courts would need to establish outer limits of their own discretionary powers. The goal would be to maintain the benefits of the current law that encourages the use of the amicus device.

The status of the law governing the amicus curiae rests on the principle of flexibility.[274] Flexibility allows courts to handle problems in fair and innovative ways. As a result, a court's use of an amicus curiae may enhance judicial efficiency by allowing cases to be consolidated,[275] providing the court with means of gathering infor-

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273. *See supra* notes 107-22 and accompanying text (outlining creation of governmental amicus curiae); *supra* notes 131-32 and accompanying text (discussing examples of outgrowth of private litigating amicus curiae from realm of governmental amicus activity).

274. *See supra* notes 16-18 and accompanying text (discussing concept of flexibility in evolution in amicus curiae device).

275. *See supra* note 270 and accompanying text (revealing that *Michigan Prisons Case* court granted *Knop* class litigating status on condition that class dismiss other claims against defendant).

mation,[276] as well as ensuring party compliance with its decrees.[277] In addition, the common law amicus curiae device provides for the equitable representation of third parties.[278] An amicus that goes too far, however, can nullify the gains of efficiency and fairness.[279] Courts, therefore, must find a proper balance and remember the need to remain within the confines of Article III and the Federal Rules of Civil Procedure.

The key to assigning the appropriate grant of power to an amicus curiae rests in the ability or inability of the amicus to control the course of the litigation. As *Boeing* and the *Michigan Fishing Rights Case* indicate, the amicus curiae can provide invaluable aid to federal courts in their attempt to reach efficient or equitable results.[280] In both instances, the amici remained subordinate to the actual parties, able to influence but not to dominate the proceedings.[281] The *Michigan Prisons Case* litigating amicus, on the other hand, provides an example of how a court's goals may be frustrated when the amicus is vested with full litigating rights. The original parties were unfairly denied their opportunity to litigate the merits of their dispute and

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276. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (recognizing amicus curiae's assistance in investigating facts surrounding prison conditions); *In re* Estelle, 516 F.2d 480, 482 (5th Cir. 1975) (indicating that district court ordered United States to act as amicus curiae to investigate facts alleged in prisoners' complaint), *cert. denied*, 429 U.S. 873 (1976); *Michigan Prisons Case*, 680 F. Supp. 928, 985 (W.D. Mich. 1987) (allowing amicus to present witnesses to assist court in understanding factual context underlying compliance proceeding); McCoy v. Briegel, 305 S.W.2d 29, 39 (Mo. Ct. App. 1957) (stating that court may appoint amicus to perform services designed to guide court to correct result); Detroit Trust Co. v. Mason, 15 N.W.2d 475, 484 (Mich. 1944) (finding that trial court may appoint amicus to investigate additional reorganization plans and to solicit bids). The information gathering capacity of an amicus is significant. The judge is only one person, in charge of a multitude of cases. In many instances, the use of an amicus curiae aids the court in discovering facts that would remain unearthed without placing excessive demands on the judge's time and capabilities. In this sense, the amicus can become the eyes of the court.

277. *See supra* note 268 and accompanying text (stating that one benefit of conferring litigating status on amici is that group will act as enforcer of court's orders because of group's interest in outcome).

278. *See supra* notes 161-65 and accompanying text (discussing theory that court's equitable powers allow for use of amicus device to ensure adequate representation). A form of a district court's inherent authority is "rooted in the notion that a federal court sitting in equity, possesses all of the common law equity tools of a chancery court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563 (3d. Cir. 1985) (quoting ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)).

279. *Michigan Prisons Case*, 940 F.2d 143, 161-64 (6th Cir. 1991) (discussing how grant of full litigating powers to amicus actually exacerbated settlement process and resulted in extending duration of litigation).

280. *See supra* notes 176-77 and accompanying text (discussing how court's use of litigating amicus actually aided in reaching efficient results).

281. *See supra* notes 157-59, 173-74 and accompanying text (indicating that litigating amicus in *Boeing* and *Michigan Fishing Rights Case* did not possess ability to exercise veto power over proceedings).

an antagonistic amicus increased the intensity and extended the duration of the litigation.[282]

The common law solution to the amicus curiae problem, therefore, must begin with the premise that in most instances the power of an amicus curiae must be limited. The second step is to recognize the current development of the law and develop standards accordingly. Presently, the amicus curiae can be categorized into two groups: the traditional amicus curiae and the litigating amicus. The litigating amicus can be further subdivided into governmental and private litigating amici. To reach a workable system of standards, attention must be paid to the development and benefits of each.

A workable standard must be divided into two parts. First, in every instance, the court's discretion should be the overriding guide.[283] The ultimate decision in each case as to whether an amicus may participate before a court must rest solely with the trial judge. The judge must be able to decide if and how long an amicus curiae may serve. Given the level of intimacy a judge acquires with a case and its participants, only the district court judge can determine whether the services of a given amicus curiae are warranted in a given case. This original common law discretionary standard is all that should be required to obtain traditional amicus curiae status allowing participation in briefing and oral argument.

The second part of the inquiry is necessary only in instances when status as a litigating amicus is assigned or sought. In these circumstances, the analysis for private and governmental entities should be distinct. The standard of *Universal Oil Products Co. v. Root* and its progeny should apply to governmental amici. This standard would allow a district court to request or order a concurrent branch of the Federal Government to represent the public interest.[284] This defer-

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282. *See Michigan Prisons Case*, 940 F.2d at 161 (indicating that contempt proceedings and compliance problems centered on State of Michigan's aggressive opposition to litigating role of *Knop* amicus); *id.* at 164 (stating that *Knop* class as litigating amicus "virtually assumed effective control of the proceedings in derogation of the original parties to this controversy").

283. *See supra* notes 17 & 131 and accompanying text (indicating wide-spread and long-term use of discretionary standard). It must be clarified that the term "discretion" refers to the ability of a court to either allow or disallow an amicus to participate. This Comment does not advocate the use of the discretionary standard to justify evasion or abrogation of the Federal Rules of Civil Procedure. Rather, a court must be able to use its proximity to and its familiarity with the action to determine if an amicus is required or warranted. If a fixed standard were used, third parties could gain amicus status without any judicial check and a court would risk losing control of the case.

284. *See* Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946) (positing that federal judiciary may call on executive branch to act as amicus curiae to serve public interest). Courts commonly cite the *Root* case, or its reasoning, in instances where they grant governmental amici expansive amicus curiae powers. *See* Faubus v. United States, 254 F.2d 797, 805 (8th Cir.) (stating that it is customary for federal courts to request aid and advice from executive branch and permit United States to play more than traditional amicus role by allowing

ential standard recognizes the fundamental aspects of federalism. The Federal Government must be able to act as a unit, rather than three separate branches, in instances where order must be maintained or justice guaranteed.

The second part of the inquiry differs when a private amicus is seeking litigating status. Where private amici are involved, the appropriateness of the enhanced status cannot be presumed, but should have to meet a showing similar to those seeking intervention.[285] Instead, courts appear to have translated the requirements for formal intervention into a standard that must be met before granting litigating status to an amicus curiae. First, the potential amicus must have an obvious stake in the outcome of the litigation.[286] This element assures that the status of private litigating amicus adheres to Article III policies and additionally assures that the court will be able to focus on the actual controversy before it.[287] Second, the would-be litigating amicus must be able to raise doubts

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them to file for injunctive relief), *cert. denied*, 358 U.S. 829 (1958); DeVonish v. Garza, 510 F. Supp. 658, 659 (W.D. Tex. 1981) (citing *Root* and approving prior appointment of United States as litigating amicus curiae in Texas prisoners' rights case); Costello v. Dugger, 353 F. Supp. 1324, 1325 (M.D. Fla. 1972) (asserting that district court may, sua sponte, appoint United States to represent public interest); FDIC v. Fireman's Fund Ins. Co., 271 F. Supp. 689, 691 (S.D. Fla. 1967) (stating that participation of United States as amicus curiae is appropriate, because public interest needs protection); Aaron v. Cooper, 163 F. Supp. 13, 16 (E.D. Ark. 1958) (reasoning that court requested United States to enter school desegregation proceeding as amicus curiae and begin injunctive proceedings against defendants who were interfering with court's order); *see also* Krislov, *supra* note 1, at 718-19 (describing instances where district courts ordered United States to act as litigating amici, and where amici's traditional role as friend of court became "peculiar sort of advocacy"); *supra* notes 88 & 90 and accompanying text (discussing governmental access to courts through judicial invitation).

285. *See* United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982) (requiring prospective intervenor to overcome presumption against third-party involvement). A presumption in favor of the original parties is not uncommon. Under the Federal Rules, a prospective intervenor faces a rebuttable presumption that a present party adequately represents the interests. *See id.* (stating that to overcome presumption, prospective intervenor must establish that interest is more specialized and party will not present necessary arguments); Morgan v. McDonough, 726 F.2d 11, 14 (1st Cir. 1984) (instructing that to overcome presumption, third party must show collusion between representative party and opposing party and that representative party has adverse interest to projective intervenor or that representative party has failed to fulfill its duty to represent third party). Such presumptions appear to strike a balance between the interests of the original parties and the potentially affected nonparties. In this manner, the adversarial nature of the proceedings is maintained without preventing third-party involvement. *See supra* note 255 (discussing policy factors embodied within federal intervention procedures).

286. *See* EEOC v. Pan Am. World Airways, Inc., 52 Fair Empl. Prac. Cas. (BNA) 926, 927 (N.D. 1987) (acknowledging that although claimants' interest is insufficient to satisfy intervention requirement, claimants do have obvious interest in outcome of action); *Michigan Prisons Case*, 116 F.R.D. 655, 663 (W.D. Mich. 1987) (noting constitutional rights of amicus are at stake); EEOC v. Boeing Co., 109 F.R.D. 6, 9 (W.D. Wash. 1985) (recognizing that pilots have interest in outcome of lawsuit and that "their futures are clearly affected by this lawsuit in a vital way," but that interest is insufficient to create right to intervene).

287. *See supra* notes 48-49 (discussing policies underlying Article III standing requirement).

about the effectiveness of the parties' representation of its interests.[288] Third, the supplicant must be able to bring to the proceedings some necessary insight and knowledge.[289] The last two elements assure that the court actually requires the litigating amicus' presence and assistance. Without a standard that operates much like the requirements of intervention, the court will face needless repetition and will waste judicial resources. Fourth, one of the parties or the court must welcome the assistance of the litigating amicus.[290] Finally, in all instances, the litigating amicus must not be placed on equal footing with a full-party. If all of these elements are present, the court may grant litigating amicus status under its inherent equitable powers.

This suggested standard for determining the appropriate involvement of amici curiae at the district court level is workable in light of the precedent that created the litigating amicus. There are, however, several impediments to implementing such a standard. First, assuming courts are willing to consider the issue, the piecemeal nature of litigation would require a string of several cases to implement such a plan. Courts would probably be unwilling to give a definitive form to the amicus curiae device. In the past, courts have avoided defining the amicus curiae in an attempt to keep it malleable and adaptable for their own desired use.[291] Although understandable, this position is no longer tenable under the modern rules of third-party practice. Courts need to place the amicus curiae somewhere within the formal framework, rather than pretend a framework does not exist.[292]

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288. *See Pan Am. World Airways, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) at 928 (reasoning that claimants had succeeded in raising doubts about effectiveness of EEOC representation); *Michigan Prisons Case*, 116 F.R.D. 655, 658 (W.D. Mich. 1987) (noting that it was evident that United States and *Knop* amicus had different views about compliance issues and did not always have common goals and interests); *Boeing*, 109 F.R.D. at 8-9 (stating that parties sought intervenor status after attempts to communicate with EEOC and acquire EEOC assistance failed).

289. *See Pan Am. World Airways, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) at 928 (emphasizing that court was convinced that claimants would provide needed perspective and expertise); *Michigan Prisons Case*, 116 F.R.D. at 662 (stating that although facts are well known, granting litigating status to *Knop* class would assist court in interpreting facts and in determining whether those facts show violation of decree); *Boeing*, 109 F.R.D. at 11 (recognizing that pilots' counsel has extensive experience and expertise in matter).

290. *See Pan Am. World Airways, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) at 928 (finding it significant that EEOC welcomed claimants' participation); *Boeing*, 109 F.R.D. at 11 & n.6 (noting that EEOC did not oppose pilots limited participation, but that if EEOC had taken formal position regarding private-party intervention under particular statute, court would have deferred).

291. *See supra* notes 16-18 and accompanying text (describing evolution of amicus curiae device and stating that courts were reluctant to give clear definition of amicus device so that they could use it to circumvent limitations of system).

292. *See* Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987) (asserting that federal district courts should exercise their inherent powers in manner consistent with Fed-

*2. Adoption of a Federal Rule of Civil Procedure to govern amicus curiae activity within federal district courts*

An alternative approach for clarifying the amicus curiae's proper role is to adopt a rule that would govern amicus activity at the district court level. This idea is not unique in federal courts. In fact, the procedural rules for the U.S. Courts of Appeal and the Supreme Court contain provisions pertaining to amicus activity.[293] In one step, an addition to the Federal Rules of Civil Procedure could establish a uniform standard for obtaining amicus status, could delineate the limits of power an amicus could exercise, and could place the amicus directly within the context of the other third-party practice rules.[294]

*a. Factors warranting change*

Several factors warrant the creation of a codified amicus provision. The most persuasive reason evolves from the origin of the amicus curiae device. The amicus curiae evolved from common law and has been limited only to the extent that courts felt obligated to respect prior precedent. Courts, therefore, remain free to expand or restrict the caselaw governing the amicus. It is this common law origin that has led to the device's hazy parameters. Accordingly, as in other areas of the law, a legislative enactment provides an opportunity to define the parameters for amicus activity. Congress and the Supreme Court, through rulemaking, could specifically place the amicus curiae within the confines of the Federal Rules. The mere presence of the Federal Rules' provisions regarding third-party practice are insufficient to limit or define the use of amici curiae.[295]

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eral Rules of Civil Procedure, because those rules were product of many carefully made policy decisions).

293. *See* SUP. CT. R. 37 (allowing amicus to file brief with written consent of both parties or under leave by Court); FED. R. APP. P. 29 (permitting amicus to file brief with either consent of parties or by leave of court). For example, Rule 29 of the Federal Rules of Appellate Procedure states:

> A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of the court . . . except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. . . . A motion of an amicus curiae to participate in the oral argument will be granted only for *extraordinary* reasons.

*Id.* (emphasis added).

294. *See* FED. R. CIV. P. 19 (delineating circumstances where joinder of parties is necessary); FED. R. CIV. P. 20 (establishing circumstances where joinder of parties is permissible rather than mandatory); FED. R. CIV. P. 23 (creating class actions, where similarly affected parties may seek redress of their rights together); FED. R. CIV. P. 24 (establishing procedure for intervention, which allows nonparty to join suit that may affect nonparty's interest).

295. *See* Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985) ("[T]he rules of civil procedure do not completely describe and limit the power of district courts . . . ."), *cert. denied*, 475 U.S. 1018 (1986); Eash v. Riggins Trucking Inc., 757

District courts may continue to use their common law powers to enlarge amicus activity unless positive law is created to check this exercise of discretion.

Another reason for seeking a legislative rather than a common law solution is a desire for consistency. Presently, the Federal Rules establish the confines of federal litigation and regulate the relationship between named parties and third parties. Amici curiae have the ability to affect not only the dynamics and course of the litigation, but also the relationship between parties. In fact, the amicus curiae device has become a powerful means of third-party practice. As a result, it is appropriate that the Federal Rules be amended to include all of the devices that affect federal practice.

*b. A suggested approach*

Codifying the amicus curiae concept is a difficult task. Strong reasons exist both for retaining the present vague status of the amicus and for clarifying its proper role. With this in mind, drafters must strive to retain those aspects of the amicus curiae that have made the device an invaluable part of Anglo-American litigation. The goal should be to codify the common law traits of flexibility and adaptability while limiting the amicus' potential for abuse.

The following draft rule seeks to meet these aims:

> Rule 24.1. Amicus Curiae
>
> (a) GENERALLY. The district court shall have the ability within its discretion to appoint or accept through motion or application, amicus curiae in a given litigation, subject to (b).[296] The amicus curiae, at the court's discretion, may serve the court, represent the public interest, or advocate the positions of those beyond the jurisdiction of the court.[297] The court's power to appoint or accept

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F.2d 557, 560-62 (3d Cir. 1985) (detailing inherent powers of federal district courts, beyond those listed in Federal Rules of Civil Procedure).

296. *See supra* notes 79-86 and accompanying text (discussing benefits of allowing trial court to retain discretionary control of amicus curiae activity at trial court level). The discretionary standard is firmly established in the federal judiciary and useful in controlling the judicial proceedings. *See, e.g.*, Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) (stating grant or denial of amicus status lies wholly within court's discretion); Ginsburg v. Black, 192 F.2d 823, 825 (7th Cir. 1951) (positing that granting or refusal of amicus participation is discretionary), *cert. denied*, 343 U.S. 934 (1952); Pennsylvania Envtl. Defense Found. v. Bellefonte Borough, 718 F. Supp. 431, 435 (M.D. Pa. 1989) (asserting appointment of and control of amicus curiae is within discretion of court). In addition, the fact that the court has discretion to control amicus curiae activity conforms to other rules that vest a judge with the power to control the proceedings. *See, e.g.*, FED. R. CIV. P. 6(b) (indicating judge has discretion to enlarge time allotments found under Rules); FED. R. CIV. P. 16 (enabling judge, at own discretion, to order trial processes); FED. R. CIV. P. 26(d) (referring to judge's ability to control order and scope of discovery); FED. R. EVID. 104(a) (stating that questions concerning qualifications of witnesses, privileges, or admissability of evidence are determined by court).

297. This portion of the draft rule reflects the differing roles the amicus has played in

amicus curiae includes the ability to determine the nature and scope of the amicus curiae's activity within the proceedings.

(b) LIMITATIONS OF AMICUS CURIAE ACTIVITY WITHIN FEDERAL COURTS.

(1) Private persons acting as amicus curiae may, among other things, participate through written brief, oral argument, or, as the district court allows, initiate judicial proceedings of its own motion or invoke the enforcement powers of the court *provided* that the amicus cannot exercise control over the litigation.[298]

(2) Governmental bodies acting as amicus curiae shall be treated like private persons, *unless* invited or ordered by the court to assure justice or act in the public interest.[299]

## CONCLUSION

The emergence of the litigating amicus curiae, a distant cousin of the original Anglo-American common law device, has engendered confusion within the federal courts. The litigating amicus curiae, however, merely reflects the culmination of the evolution of the common law amicus curiae. The amicus' evolution embodies a trend allowing representation of adverse third parties in a judicial system unresponsive to their needs. Although the Sixth Circuit rejected the litigating device and called for a return to traditional amicus activity, this will not be the end of the matter. Existing legal precedent coupled with the active principles of flexibility and equity assure that the problem of defining the proper role for the amicus

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history. This section attempts to preserve the amicus' ability to interject the voices of interested and unrepresented third parties into litigation, rather than accept the reactionary views of those who would return the amicus to a severely limited role. *See Michigan Prisons Case*, 940 F.2d 143, 164 (6th Cir. 1991) (presenting narrow definition of proper amicus activity).

298. *See supra* notes 103, 121, 159, 174 and accompanying text (suggesting that natural limit of amicus curiae activity should be point where amicus gains control of litigation and acts as full-party-in-interest). This subsection recognizes the usefulness of the *Boeing* and *Michigan Fishing Rights Case* line of cases in resolving complex multi-dimensional litigation and adopts their limitation that the amicus may not impose its will on the parties' management of the suit. Under the proposed rule, an amicus would not be able to engage in any activity where it could independently invoke the power of the federal court. This includes compelling discovery, engaging in motion practice, or seeking enforcement of judicial judgments or consent decrees.

299. This subsection recognizes that in many instances private and governmental amici possess similar abilities. However, this subsection codifies a broad policy-based exception recognized in federal caselaw. Accordingly, a federal district court may grant litigating status to a governmental amicus where wide scale deprivation of the rights of the federal citizenry is at stake, or when the court needs to carry out its judicial orders. *See supra* notes 115-21 and accompanying text (relating cases where federal governmental amici exercised more than traditional amici role). Courts need to be able to maintain the balance between governmental interests and interests of individual citizens in protecting their rights. *See supra* note 130 and accompanying text (stating that amici can aid courts in being attentive to and informed of these interests).

curiae will persist. As a result, courts or Congress must act to place the amicus curiae within the framework of the Federal Rules of Civil Procedure and within other principles that affect litigation within federal courts. Unless such action is taken, future courts will find that all their friends have abandoned them and will discover parties standing in their stead.